for The Defense Volume 26 Issue 2






METHODS FOR DEFENSE

A Fresh Approach to Attacking Arizona's Gang Statutes

Seth Apfel, Defender Attorney

A.R.S. § 13-105 broadly defines the terms "criminal street gang" and "criminal street gang member" as follows:

> 8. "Criminal street gang" means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member.
>
> 9. "Criminal street gang member" means an individual to whom at least two of the following seven criteria that indicate criminal street gang membership apply:
>
> (a) Self-proclamation
>
> (b) Witness testimony or official statement
>
> (c) Written or electronic correspondence
>
> (d) Paraphernalia or photographs
>
> (e) Tattoos
>
> (f) Clothing or colors
>
> (g) Any other indicia of street gang membership

Topics

Given the incredible breadth of the definitions, a person who is a member of nearly any group fits at least two or more of the criteria; in fact, one would be hard pressed to imagine any group member (perhaps even any person at all, since most people belong to some type of group) who would not fit at least two criteria. Moreover, these definitions have potentially onerous consequences within Arizona's criminal code. A.R.S. § 13-2321 makes it a class 2 felony to participate in the criminal activity of a gang, and a class 3 felony to assist any (criminal or non-criminal) activity of a gang. Six criminal offenses become higher level felonies if the alleged offender is involved in a gang.[1] Three statutes may create significant sentence enhancements where an offender is involved in a gang.[2] Additional statutes make gang involvement an aggravator for death penalty purposes, A.R.S. § 13-751(F)(11), a factor in determining whether a juvenile will be tried as an adult, A.R.S. § 13-504, a factor giving rise to an inference that an alleged offender is non-bailable, A.R.S. § 13-3961(G), and a basis for gang terms on probation, which permit imposition of sex-offender registration-like monitoring, A.R.S. § 13-3829.

In light of these harsh statutes, it is not surprising that numerous efforts have been made by defense attorneys to challenge the broad definitions described above. These challenges have generally focused on two grounds: vagueness and equal protection. However, each of these grounds has encountered legal obstacles that have allowed the statutes to survive challenge.

With respect to equal protection, the problems with challenging the gang statutes under the Fourteenth Amendment are readily apparent. Specifically, there is no suspect classification that is being facially targeted under the statutes. In the absence of a suspect classification, any challenge to the statutes will be evaluated by courts under the deferential rational basis standard, rendering a determination of unconstitutionality a near impossibility. Consequently, a challenge must seek to argue there is discriminatory enforcement against a suspect classification; however, given that the State has targeted groups of all races and genders, discriminatory enforcement will be incredibly difficult to prove. As a result, the Fourteenth Amendment has offered no refuge.

As for vagueness, the void-for-vagueness doctrine would seem to offer some promise given the overwhelming breadth of the gang statutes. However, Arizona courts (as well as courts in other jurisdictions) have consistently rejected these challenges, not on the merits, but rather due to lack of standing. Specifically, "[a] defendant whose conduct is clearly proscribed by the core of the statute has no standing to attack the statute." *State v. Baldenegro*, 188 Ariz. 10, 14, 932 P.2d 275, 279 (App. 1996) (quoting *State v. Tocco*, 156 Ariz. 116, 119, 750 P.2d 874, 877 (1988)); *see also State v. Ochoa*, 189 Ariz. 454, 460, 943 P.2d 814, 820 (App. 1997).

As a result of the above decisions and obstacles, challenges to the criminal street gang definitions and associated statutes have consistently failed. But capitulation to constitutionality of these statutes would be misplaced; there is, as yet, an entire body of case law, one that offers greater promise than either vagueness or equal protection, that can and should be used to seek to nullify these statutes.

Content and Viewpoint Discrimination Against Speech and Association

The First Amendment provides "Congress shall make no law…abridging the freedom of speech…or the right of the people to peaceably assemble." U.S. Const. Amend. I; *Virginia v. Black*, 538 U.S. 343, 358 (2003). These principles are similarly enshrined in the Arizona Constitution in Article 2, §§ 5, 6. "The hallmark of the protection of free speech is to allow 'free trade in ideas' – even ideas that the overwhelming majority of people might find distasteful or discomforting." *Black*, 538 U.S. at 343 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Jolmes, J., dissenting) and *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). Consequently, the "First

Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (internal citations omitted). "Content-based regulations are presumptively invalid," and are subject to the highest scrutiny. *Id*. (collecting cases).

In addition to protecting the rights of free speech and assembly, the Supreme Court has repeatedly held that "the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs." *Dawson v. Delaware*, 503 U.S. 159, 163-64 (1992) (citing *Aptheker v. Secretary of State*, 378 U.S. 500, 507 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (*NAACP*)). The Court has noted that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process clause of the Fourteenth Amendment, which embraces freedom of speech," because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460.

Though the Supreme Court has crafted a number of categorical exceptions limiting the right to free speech,[4] the Court has not crafted any such exceptions that limit or exclude certain associations based on the ideas they espouse. To the contrary, while the speech itself of associations may be subject to limitation, the Court has specified that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id*. at 460-61. Accordingly, courts have repeatedly refused to permit state action based solely on affiliation or association with a particular group. While permitting restrictions on illegal activity itself, they have upheld the associational rights of, *inter alia*, white supremacist groups advocating racial violence, *Black*, 538 U.S. at 343 (upholding the right to burn a cross where not intended to intimidate a particular person), domestic members of overseas terrorist organizations, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding a ban on providing funds to such groups in part because the ban did not criminalize "mere membership"), and even alleged criminal street gangs, *McCoy v. Stewart*, 282 F.3d 626 (9th Cir. 2002) (rejecting an attempt by Arizona to punish a speaker, under the Assisting a Criminal Street Gang statute, for encouraging members of a gang to pursue certain illicit activities); *United States v. Rubio*, 727 F.2d 786 (9th Cir. 1983) (recognizing the associational rights of Hell's Angels).

In light of the forgoing, it is clear that a person cannot be punished for mere membership in an organization alleged to be a criminal street gang. Nevertheless, alleged criminal street gang members consistently face prosecution and substantial sentence enhancements due to their associations. Yet, as noted above, given the expansive penumbra of the definition of "criminal street gang member," many organizations come within the definition's ambit. The problem, and the source of a strong constitutional challenge, becomes more evident through examination of some such organizations whose very nature promotes criminality, and the differences between those that face prosecution under the gang statutes and those who escape it.

Fraternities (colors, tattoos, clothing and/or other indicia of membership, proclamation, and felonious conduct including

sexual assaults, DUIs, drug offenses, and assaults), football teams (colors, tattoos, clothing and/or other indicia of membership, proclamation, and felonious conduct including sexual assaults, DUIs, drug offenses, domestic violence, and assaults), Goldman Sachs and other Wall Street corporations (logos, colors, proclamation, correspondence, and felonious conduct such as fraud, theft, money laundering, and racketeering), and law enforce-

ment agencies (colors, clothing and/or other indicia of membership, proclamation, and felonious conduct including assaults, murder, and corruption), in addition to traditionally prosecuted criminal street gangs, such as motorcycle clubs and inner city gangs, are all examples of organizations that fall squarely within the definitions provided in A.R.S. §§ 13-105(8), (9).

Considering that all of these organizations fit squarely within the criminal street gang statutory definitions, the naturally-engendered inquiry should seek to determine the difference between the first four associations, whose members have never once faced prosecution under the gang statutes, and inner city gangs and motorcycle clubs, whose members frequently face such prosecution. All engage in felonious conduct, and that conduct arises out of the very nature of the associations. All wear colors or have logos, and openly proclaim their membership. Yet the first four consistently escape prosecution, while inner city gangs and motorcycle clubs are frequently targeted.

Examining these groups, one major difference is evident. The first four groups promote (or at least ostensibly promote) messages that are popular and that are clothed with establishment approval, such as academics and charity, athletics and competition, capitalism, and protecting the public. In contrast, inner city gangs and motorcycle clubs promote less mainstream ideologies, including rebellious and anti-authoritarian behavior, dislike of authority (especially law enforcement), drug use, violence, and non-conformity. Since the only ascertainable and relevant feature separating groups the State prosecutes under the gang statutes from those it opts not to involves expression/association, the issue becomes whether or not such an approach is constitutionally permissible, i.e. whether this selective prosecution constitutes impermissible content and/or viewpoint discrimination of protected speech and/or association.

"The principle inquiry in determining content-neutrality... is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Turner Broadcasting Systs. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal brackets omitted) (ellipses in original). "*Even a regulation neutral on its face* may be content-based if its manifest purpose is to regulate speech because of the message it conveys." *Id*. at 645 (emphasis added). Where a generally applicable law, without reference to content or viewpoint, is directed at an individual or group because of what that group communicates, a more rigorous level of scrutiny must be applied. *Holder*, 561 U.S. at 28.

As noted above, it is easily demonstrable that the State is targeting some groups for prosecution under the gang statutes, while exempting others where the difference is attributable solely to message. Consequently, the gang statutes must be subjected to heightened scrutiny;[4] under heightened scrutiny, even if the government could carry its burden to show a compelling interest that the law promotes, such scrutiny still requires that the law be narrowly tailored. Now, the vagueness issue becomes highly relevant.[5] "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The fact that the decisions respecting whom the State prosecutes under the gang statutes are the result of standardless and arbitrary discretion afforded to the State by the vagueness of the statutes evinces the statutes' unconstitutionality, as they fail to adhere to the required narrow tailoring required of statutes inhibiting protected expression and/or association, particularly where the inhibition is content and/or viewpoint-based.

Because of the frequency with which issues respecting the gang statutes arise, and in particular because of the severe consequences that arise from application of the gang statutes, every avenue should be explored to attack these broad and standardless laws. Reframing the issue as a First Amendment issue, thereby raising the specter of content and or viewpoint discrimination, not only provides a fresh approach to the problem, but also shifts the burden to the State, and presents a high bar for the State to over-

come in justifying the breadth of the statutes. As a result of that high bar, the State may be unable to justify the statute, and defendants may finally have the opportunity to be free from its severe results.

ENDNOTES

1 A.R.S. § 13-2321 (Threatening and Intimidating, from M1 to F6 or F3); A.R.S. § 13-1602 (Criminal Damage, from M1 to F5); A.R.S. § 13-1805 (Shoplifting, from M1 to F5); A.R.S. § 13-2409 (Obstructing Criminal Investigation or Prosecution, from F5 to F3); A.R.S. § 13-2512 (Hindering Prosecution, from F5 to F3); A.R.S. § 13-3102(9) (Misconduct Involving Weapons, F3).

2 A.R.S. § 13-714 (plus 5 years flat for class 2 or 3 felonies, plus 3 years flat for class 4, 5, or 6 felonies, and ineligible for any suspension of sentence, probation, pardon, or release); A.R.S. § 13-709 (plus 5 years if offense committed in a school safety zone and offender is gang member); A.R.S. § 13-706(F)(2)(r) (falls under definition of "serious or aggravated felony" if there is gang involvement).

3 Such categories of unprotected speech include true threats, obscenity, child pornography, defamation, fraud, incitement to imminent lawlessness, and speech integral to criminal conduct (such as advertising and selling of child pornography). *United States v. Stevens*, 559 U.S. 460 (2010). It should be noted that, even if such categories did apply to association, criminal street gangs would not fall squarely within any of them.

4 Additionally, some groups targeted for prosecution under the gang statutes, particularly motorcycle clubs that require dues and engage in merchandizing, may also be entitled to intermediate, but still heightened, scrutiny because their speech may be construed as commercial speech. See *Sorrell v. IMS Health*, 131 S.Ct. 2653 (2011); *Virginia Pharmacy Bd. v. Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976). The case law governing commercial speech subjects regulations of such speech to a four part test, under which the speech may be restricted or prohibited if: (1) it is misleading or is related to unlawful activity; (2) if not (1), the State must show a substantial interest; (3) if a substantial interest is shown, the regulation or prohibition must directly advance that interest; and (4) the regulation or prohibition must be narrowly tailored (or the least restrictive means).

5 For that matter, so does overbreadth. A statute is overbroad, in violation of First Amendment protections, "if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)).

LEGAL DEVELOPMENTS

Fighting Civil Forfeiture as a Public Defender after *Luis v. United States*

Adam Schwartz, Defender Attorney

The Public Defender Enabling Statute has historically prevented Arizona's Public Defenders from assisting defendants in civil forfeiture actions because parties are not legally entitled to counsel in civil matters.[1] This was true even when the civil forfeiture case was directly tied to the alleged criminal conduct for which the Public Defender was appointed. However, a recent U.S. Supreme Court case, *Luis v. United States*, 136 S.Ct. 1083 (2016), explains that the State's pre-trial seizure of "untainted" assets may violate a Defendant's right to choice of counsel under the Sixth Amendment to the U.S. Constitution.

The choice of counsel issue is a constitutional right belonging to a criminal defendant and one that needs to be protected by his assigned attorney. For the Public Defender representing an indigent defendant who has had "untainted" assets seized, this means that the Enabling Statute may permit appointed counsel to assist the defendant in challenging the seizure so that the defendant can hire private counsel. Failure to release seized "untainted" assets that a defendant wishes to use to retain private counsel constitutes a structural Sixth Amendment violation that is not subject to a harmless error analysis.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to "have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel includes the "fair opportunity to secure counsel of his own choice." *Powell v. State of Ala.*, 287 U.S. 45, 53 (1932). A violation of the right to choice of counsel "unquestionably qualifies as 'structural error'"

and therefore is "not subject to a harmless-error analysis." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 152 (2006). The reason for such a standard of review is that "the Sixth Amendment right to counsel of choice . . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, (2006).

The Sixth Amendment right to counsel of choice includes the right of a defendant to use his or her own assets to hire counsel so long as those assets are "untainted" by criminal conduct. *See Luis v. United States*, 136 S. Ct. 1083, 1090 (2016).[2]

Where the State seizes or freezes a defendant's "untainted" or "innocent" assets prior to a finding of guilt, that seizure violates the Sixth Amendment by interfering with the defendant's ability to hire counsel of choice. *Luis*, 136 S. Ct. at 1096.

The *Luis* Court did reaffirm that "an indigent defendant, while entitled to adequate representation, has no right to have the Government pay for his preferred representational choice." *Luis*, 136 S. Ct. at 1089. However, a defendant who *has* untainted but seized assets, and would use those assets to hire counsel but for their seizure, must have access to those assets to comply with the Sixth Amendment. *Id*.

The *Luis* Court provided little guidance as to what process lower courts should use to determine whether a defendant's seized assets are in fact "untainted." The Court suggested that lower courts might employ "tracing rules" found in other areas of law to determine the character of the assets a defendant is seeking to have released and, if "untainted" assets are found, how much of those assets might be released in order to retain counsel.[3] The relevant inquiry for lower courts appears to be a determination as to whether the defendant has proper title to the seized assets, or alternatively, if the defendant holds *imperfect* title because the assets are the fruits or instruments of criminal conduct. *Luis*, 136 S. Ct.

at 1090. The burden of proof initially falls on the State to show that "probable cause exists to believe that the assets in dispute are traceable ... to the crime charged in the indictment." *Id*. at 1095.

For the indigent criminal defense practitioner, there are a number of strategies that may be employed to intervene in a seizure or civil forfeiture case and it is far from settled as to what the appropriate procedure is to follow.

You might simply ask the criminal court for a redetermination of indigency under Arizona Rule of Criminal Procedure 6.4(c). This would effectively put the onus on the Court to determine the appropriate procedure. Another strategy might be to ask the criminal court to conduct a "taint" (or "*Luis*") hearing regarding the seized assets. If the court agrees to hold a "taint" hearing, you might suggest that court employ the same procedures as in a *Nebbia* or "source of bond funds" hearing. *See United States v. Nebbia*, 357 F.2d 303, 304 (2d Cir. 1966); *State v. Donahoe ex rel. Cty. of Maricopa*, 220 Ariz. 126, 131 (Ct. App. 2009).

You could also suggest the court treat this like a *Simpson* or "bond exception" hearing. *See Simpson v. Owens*, 207 Ariz. 261 (Ct. App. 2004). Finally, you might have to refer back to the civil forfeiture procedure described in A.R.S. §§ 13-4301-4315 (2016).

The statutes and procedure used in civil forfeiture employ the Rules of Civil Procedure and are not particularly favorable to the defendant seeking the release of assets. *See generally* A.R.S. § 13-4310(D)-(E) (2016); and Ariz. R. Civ. P.

For example, the State could compel a deposition of the defendant and call him as a witness. While the defendant could of course invoke, the civil rules permit the court to draw a negative inference from that invocation. Further, the civil forfeiture rules *permit*, but do not require, a court to entertain a pre-trial hearing to challenge the probable cause supporting the initial seizure. A.R.S. § 13-4310(B). In addition, civil cases have strict filing deadlines that must be complied with or any claim could be pro-

cedurally barred.[4] On the other hand, civil cases allow for broad discovery rights and allow the criminal defendant to subpoena evidence.

While the criminal court might be tempted to employ existing civil forfeiture procedure or refer this issue to the civil court, it is important for the criminal practitioner to educate the court on why this is not appropriate. First, civil forfeiture is "neither 'punishment' nor criminal for purposes of Double Jeopardy Clause." *United States v. Ursery*, 518 U.S. 267, 292 (1996). As a result, the rules and procedure created around civil forfeiture were not designed to protect the constitutional rights of a criminal defendant.

While all forfeiture actions are filed in civil court, not all forfeitures have an accompanying criminal case. It is only when the forfeiture implicates a *criminal* defendant's rights that *Luis* requires an examination of the seized assets. *Luis* expanded the Sixth Amendment to add a substantive right for criminal defendants and as such, it is only appropriate that criminal courts create the procedure by which a criminal defendant can challenge a violation of that substantive right.

Once you have convinced your criminal judge to hold a hearing on the issue of the whether the seized assets are tainted, you will need to suggest a standard of review. *Luis* suggests that the burden is initially on the State to show probable cause supporting the seizure.

Typically, probable cause will have been established through the application and approval of a seizure warrant long before the appointment of indigent counsel. Here, you could suggest to the criminal court that while probable cause might be sufficient for the initial seizure, *preponderance of the evidence* or even *proof evident presumption great* is more appropriate in a hearing to determine the sub-issue of whether the State has sufficient proof regarding the nature of the assets to deprive a defendant of his Sixth Amendment right to counsel of choice.[5] Note that in the civil trial context, the burden is on the State to establish by preponderance of the evidence that the assets are subject to forfeiture. A.R.S. § 13-4310(E)(1); 13-4311(M).

What to look for to determine whether a forfeiture issue exists:

If there has been a seizure, get a copy of the seizure warrant and look for how the document characterizes the seized assets.

- Assets that have been seized 1) as "**substitute**" or 2) "**in personam**" assets are, by definition, "untainted" and, to the extent they are needed to retain private counsel, must be returned.
- If assets are seized as "**in rem**" or "**in personam and/or in rem**" assets, those assets must also be released unless the State can show that the assets are the fruits or instrumentalities of crime (i.e. tainted assets).[6]

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1 See A.R.S. § 11-584(A)(10) (West 2016), Public Defenders may only represent "a person who is entitled to counsel as a matter of law and who is not financially able to employ counsel . . . in any [] proceeding or circumstance in which a party is entitled to counsel as a matter of law."

2 The *Luis* court reasoned that in a pre-trial setting, a defendant maintains clear title over his property and should be allowed to use that property to hire counsel unless his title to the property is marred by the taint of criminal conduct.

3 "Courts use tracing rules in cases involving fraud, pension rights, bankruptcy, trusts, etc. (citation omitted). They consequently have experience separating tainted assets from untainted assets, just as they have experience determining how much money is needed to cover the costs of a lawyer." *Luis v. United States,* 136 S. Ct. 1083, 1095 (2016) (the Court's citations indicate that reasonable attorney's fees under the Equal Access to Justice Act might provide a guideline for the amount of untainted assets to be released).

4 Civil cases also have filing fees which may be waived with an affidavit of indigency.

5 See *State v. Knapp*, 114 Ariz. 531, 538 (1977) ('preponderance of the evidence' is the standard for voluntariness hearings and burden is on the State), and *Simpson v. Owens*, 207 Ariz. 261 (Ct. App. 2004) (establishing that the burden is on the State to show by 'presumption great, proof evident' that an exception exists to a defendant's right to bail).

6 "In Rem" or 'against the thing' means that the property itself has a criminal character which allows for its taking, i.e. the property is the fruits or instrumentalities of crime; "In Personam" means the filing is against the person who committed a crime and his property is subject to a taking because of his criminal conduct. See *State v. Leyva*, 195 Ariz. 13, 18-19 (Ct. App. 1998); *United States v. Ursery*, 518 U.S. 267, 296 (1996).

PRACTICE POINTER

Class Six Open Felonies for You and Your Clients

Kaitlin Perkins and Elyse Fune, Defender Attorneys

Imagine a situation where an individual is convicted of a class six undesignated felony conviction. Mistakenly believing that he automatically earned a misdemeanor when he completed his probation, he applies to buy a gun from a licensed dealer twelve years later. When asked on the application if he has ever been convicted of a felony, he genuinely believes that the correct answer is "no" and marks the box accordingly. He then purchases the gun. A few months later he finds himself before a jury, charged with forgery and misconduct involving weapons, and facing time in prison if he loses.

To avoid this situation, it is important to emphasize certain points when explaining undesignated felonies to our clients. A class six undesignated felony (also commonly referred to as a class six open felony) is a conviction that remains undesignated as either a misdemeanor or a felony.

In other words, the felony designation remains undetermined until the court determines it should be designated either a felony or a misdemeanor. This gives the client an incentive to successfully complete probation because at the end of their probation term, they can file an application to designate the conviction a misdemeanor.

Does it show up as a felony or as a misdemeanor while it is undesignated?

Until the court designates the conviction a misdemeanor, it is treated as a felony conviction. This is true even while it remains "undesignated." It is important to stress this fact to your client because there are many consequences associated with having a felony, even an undesignated one.

For example, your client will not be able to possess a weapon until that undesignated felony is designated a misdemeanor. If they are found with a weapon, not only will they be charged with a new class four felony for misconduct involving weapons, but because they still have an undesignated felony on their record, they will no longer be probation eligible at trial. Additional collateral consequences of having a felony conviction can be found here:

www.reentry.net/public2/library/attachment.139610

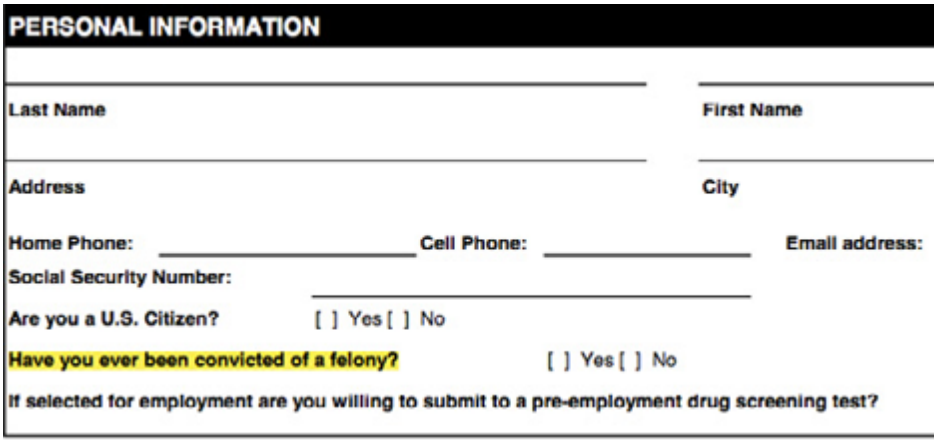
What undesignated felonies can be classified as misdemeanors?

The undesignated felony conviction must be either the client's first or second felony conviction. Additionally, the undesignated felony conviction cannot be for a dangerous offense. In other words, the conviction could not have involved the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.

How is it designated a misdemeanor?

Having an undesignated felony designated a misdemeanor is NEVER automatic! An undesignated felony conviction is designated a misdemeanor in three ways:

The first is the easiest, but also the rarest. When the client successfully completes probation, the client's probation officer can file a request with the court that the undesignated felony be designated a misdemeanor. If the court agrees, an order will be



PERSONAL INFORMATION

Last Name _____ First Name _____

Address _____ City _____

Home Phone: _____ Cell Phone: _____ Email address:

Social Security Number: _____

Are you a U.S. Citizen? [ ] Yes [ ] No

Have you ever been convicted of a felony? [ ] Yes [ ] No

If selected for employment are you willing to submit to a pre-employment drug screening test?

filed and the conviction will be considered a misdemeanor for all purposes.

Often, the probation officer will request the offense remain undesignated because the defendant has outstanding fines or probation service fees. Even when the defendant has no outstanding payments and has completed all of his/her probation terms, the probation officer may simply forget to request the court designate the offense a misdemeanor.

The second way is by filing a motion with the court, any time after your client has completed probation, requesting the court designate the offense a misdemeanor. Because the plea agreement states the offense may only be designated a misdemeanor "upon *successful* completion of probation," your client will have a much better chance at his/her offense becoming a misdemeanor if your client has indeed completed all of his/her probation terms.

This includes paying restitution, statutory fines, all probation service fees; as well as community service hours, drug and/or alcohol counseling, etc. One of the most common reasons a conviction is not designated a misdemeanor is because of outstanding fines and fees! This problem can be minimized if you ask the court to reduce the monthly probation service fee at the time of sentencing.

The third way requires the client to complete an application to have the undesignated felony designated a misdemeanor. The application can be found here: https://www.superiorcourt.maricopa.gov/sscDocs/pdf/crf2m11fz.pdf

It is very important to discuss this information with your clients any time they are considering a plea to a class six undesignated felony. Be sure to tell your client the offense will not be designated a misdemeanor automatically, and that they need to follow up after completing probation to make sure the proper paperwork is filed for it to become a misdemeanor.

You may consider keeping a list of your clients who plead guilty to class six undesignated felonies, checking the court docket upon their discharge from probation, and reaching out to those clients with a letter to remind them they still need to request that their offenses be designated as misdemeanors.

Quarterly Workshops on Restoration of Rights and Class 6 Undesignated motions are provided by the Office of the Public Advocate. Please phone their office at (602) 372-6803 or email Sharon Neill at neills@mail.maricopa.gov to get the latest information on any upcoming workshops.

AWARDS AND CELEBRATIONS

Fourteenth Annual APDA Conference

Jim Haas, Maricopa County Public Defender

The Fourteenth Annual Arizona Public Defender Association Statewide Conference was held June 22 - 24 at the Tempe Mission Palms Hotel.

Registration for the conference topped 1,400 this year. With all of the faculty and volunteers, we estimate that about 1,600 people attended the three-day conference.

At the awards luncheon, indigent representation staff and attorneys from around the state were recognized for their accomplishments and dedication to our profession and our clients. The honorees were:

Outstanding Urban Administrative Professional:
Yvette Valencia, Pima County PD

Outstanding Rural Administrative Professional:
Susan Gary, La Paz County PD

Outstanding Rural Paraprofessional:
Tommy Drennan, La Paz County PD

Outstanding Urban Paraprofessional:
Azael Ramirez, Pima County LD

Outstanding Urban Attorney:
Adam Schwartz, Maricopa County PD

Outstanding Rural Attorney:
Sara Dent, Pascua Yaqui PD

Rising Star:
Karen Vandergaw, Maricopa County PD
Ubani Ukuku, Maricopa PA
Sarah Kostick, Pima County PD

Outstanding Performance/Contribution:
David Euchner, Pima County PD

Robert J. Hooker Award:
Charnesky and Dieglio, Tucson

Gideon Award:
Phoenix Municipal Court

Adam Schwartz
Outstanding Urban Attorney

Karen Vandergaw--Rising Star

Ubani Ukuku--Rising Star

Opinion Summaries, Arizona Court of Appeals April, 2016 through July, 2016

By Kaitlin Perkins, Defender Attorney

***State v. Ruiz*, 2 CA-CR 2015-0036 (April 27, 2016):**
Convicted of multiple counts arising out of armed robbery and attempted armed robbery of two witnesses to a large marijuana theft, Mr. Ruiz was sentenced to a combined total of 47.25 years. On appeal, Ruiz argued the detective who stopped him lacked reasonable suspicion to conduct a *Terry* stop, his constitutional right against double jeopardy was violated by the trial court's apparent grant and then denial of his motion for judgment of acquittal, and there was insufficient evidence for the jury to convict him of attempted aggravated robbery and attempted armed robbery as to one of the victims. Holding: The detective had reasonable suspicion to stop Ruiz, but Ruiz's right against double jeopardy was violated when the trial court reversed its initial judgment of acquittal on two counts. Ruiz's convictions and sentences for attempted aggravated robbery and attempted armed robbery were vacated, but his remaining convictions and sentences affirmed.

¶10 Under the totality of the circumstances, at that point Hernandez had a reasonable and articulable suspicion that Ruiz had been involved in the recent armed robbery just outside the truck stop. Accordingly, Hernandez did not violate Ruiz's rights under the Fourth Amendment by stopping him long enough to complete a one-man show-up with one of the victims still present at the scene. *See Winegar*, 147 Ariz. at 446, 711 P.2d at 585. The trial court did not abuse its discretion in denying the motion to suppress the identification of Ruiz obtained during the show-up.

¶12 The Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of an acquittal even when granted by a judge before a jury verdict. *Smith v. Massachusetts*, 543 U.S. 462, 466-67 (2005). "[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). Ruiz moved for a judgment of acquittal during trial, and the counts were later submitted to the jury; therefore, after the court's ruling, Ruiz was subjected to further "'factfinding proceedings going to guilt or innocence.'" *See Smith*, 543 U.S. at 467, *quoting Smalis*, 476 U.S. at 145. The question, then, is whether the judge's initial statements regarding the motion constituted a judgment of acquittal. *Id.*

¶13 Three Arizona cases provide guidance for this fact-intensive inquiry: *State v. Newfield*, 161 Ariz. 470, 778 P.2d 1366 (App. 1989), *State v. Millanes*, 180 Ariz. 418, 885 P.2d 106 (App. 1994), and *State v. Musgrove*, 223 Ariz. 164, 221 P.3d 43 (App. 2009). In *Newfield*, on which the state relies, the trial court initially stated, "To the extent that your judgement of acquittal under Rule 20 requests an acquittal on a Class 4 felony, that will be granted," and then reversed its ruling after a brief discussion with counsel. 161 Ariz. at 471, 778 P.2d at 1367. On appeal, we concluded there had been no double jeopardy violation because of the "continuing discussion between the court, the prosecutor, and defense counsel," and the ultimate denial of the motion, also reflected in the minute entry. *Id.* at 472, 778 P.2d at 1368. In *Millanes*, the trial court granted an acquittal, the state twice sought reconsideration, and the court ultimately reversed its ruling. 180 Ariz. at 419, 885 P.2d at 107. On appeal, we reversed, relying on the trial court's restatement of its dismissal in response to the state's first motion for reconsideration and the fact that the minute entry reflected both the dismissal and the reversal after a recess. *Id.* at 422, 885 P.2d at 110. Finally, in *Musgrove*, the defendant moved for a judgment of acquittal, and the state submitted the issue on the evidence without argument. 223 Ariz. 164, ¶ 11, 221 P.3d at 46. The court granted the Rule 20 motion as to the conspiracy charge, and when the state indicated confusion, the court stated, "'I DV'd the conspiracy.'" *Id.* ¶ 11. The state asked to argue its position and the court stated it would not change its mind; after argument, however, the court reversed its ruling. *Id.* The minute entry reflected the acquittal. *Id.* We distinguished *Newfield* because the motion in that case had only been considered but not decided before denial. *Id.* ¶ 14. We vacated the conviction, holding that double jeopardy attaches immediately, and no break in proceedings is required. *Id.*

¶15 Here, the trial court's statement that it is "going to dismiss" is ambiguous. Generally, "going to," as used here, "[e] xpress[es] a plan or intention that something will happen (usually

soon), or mak[es] a prediction that something will happen, based on present events or circumstances." *Go*, Oxford English Dictionary Online (Oxford Univ. Press 2015). The statement may be a prediction of an action in the future, or, as Ruiz notes, the speaker's decision may already be made and action may be immediate. Moreover, the remainder of the transcript does not clarify whether the court merely predicted dismissal or intended immediate dismissal.

¶16 But as in *Millanes* and *Musgrove*, the minute entry unambiguously states that it granted the motion, which is then followed by an equally clear statement that the court reversed its prior ruling. *Musgrove*, 223 Ariz. 164, ¶ 11, 221 P.3d at 46; *Millanes*, 180 Ariz. at 419, 424, 885 P.2d at 107, 112. This clarifies that the trial court actually did dismiss counts two and four before reconsidering the ruling. Because we find *Millanes* and *Musgrove* controlling, we hold the trial court's reversal of its ruling and amendment of counts two and four violated Ruiz's right against double jeopardy.

Link to opinion: https://www.appeals2.az.gov/Decisions/CR20150036Opinion.pdf

***Special Action—McGuire v. Lee*, 2 CA-SA 2016-0012 (April 28, 2016):** Fifteen-year-old Emily McGuire argued in this special action that the respondent judge erred by denying her motion to dismiss the underlying armed robbery prosecution and to transfer the matter to the juvenile court. She argued that because a simulated weapon was used during the alleged robbery, it was not a violent offense and thus, she was not subject to mandatory prosecution as an adult pursuant to Ariz. Const. art. IV, pt. 2, § 22, and A.R.S. § 13-501(A). Holding: The respondent judge did not abuse his discretion in concluding the plain language of A.R.S. §§ 13-501 and -1904 (armed robbery statute) require McGuire to be prosecuted as an adult.

¶3…[McGuire] maintained that because the "plain language" of § 13-501 "reveals two reasonably plausible interpretations, it is ambiguous." She contended that based on all subsections of the statute…as well as the intent behind article IV, pt. 2, § 22 of the Arizona Constitution, a juvenile who commits armed robbery with a simulated weapon, a toy gun in this case, has not committed a violent offense and is not subject to mandatory prosecution as an adult.

¶7 In 1996, the electorate of the State of Arizona amended the constitution, adding article IV, pt. 2, § 22 by passing the Juvenile Justice Initiative, also known as Proposition 102…The express intent of the amendment was "to preserve and protect the right of the people to justice and public safety, and to ensure fairness and accountability when juveniles engage in unlawful conduct...." Ariz. Const. art. IV, pt. 2, § 22. It was designed "to make possible more effective and more severe responses to juvenile crime." *Davolt*, 207 Ariz. 191, ¶ 100, 84 P.3d at 479. "[A]ccordingly, it required the state to prosecute juveniles as adults in specified circumstances." *Lee*, 236 Ariz. 377, ¶ 15, 340 P.3d at 1090. The amendment created two categories of juveniles who must be prosecuted as adults: juveniles fifteen years of age or older who are "accused of murder, forcible sexual assault, armed robbery or other violent felony offenses as defined by" the legislature, and chronic felony offenders, also as defined by the legislature. Ariz. Const. art. IV, pt. 2, § 22(1). It left to the discretion of prosecutors the decision whether to prosecute as adults certain juveniles who are not chronic felony offenders and who commit non-violent offenses. Ariz. Const. art. IV, pt. 2, § 22(2).

¶11…McGuire asserts the statute is ambiguous because, although armed robbery is specifically listed, that offense is not necessarily a violent offense when, as here, the person or an accomplice is armed with, uses, or threatens to use a simulated deadly weapon. Under those circumstances, she insists, the juvenile is not subject to mandatory prosecution as an adult.

¶12 Article IV, pt. 2, § 22 and § 13-501(A) plainly and unambiguously list armed robbery among the felony offenses that require mandatory adult prosecution. In codifying the constitutional amendment, the legislature included in the subsections of § 13-501(A) the statutes that correspond to each of the specified offenses. Thus, § 13-501(A)(4) refers to § 13-1904, the armed robbery statute. Consistent with the constitutional provision, the legislature did not limit the application of § 13-1904 in § 13-501(A)(4) to robbery committed while the person or an accomplice is armed with a deadly weapon or uses or threatens to use a deadly weapon…

¶14 With respect to the list of offenses that require a juvenile to be prosecuted as an adult, we have found the constitutional provision clear. *Soto*, 190 Ariz. at 455, 949 P.2d at 544 (finding "'forcible sexual assault' no more vague than murder or armed robbery"). As we previously stated, the language of § 13-501(A) is equally clear. We presume that, when the legislature enacted § 13-501, it was aware that under § 13-1904, armed robbery may be based on the use or threatened use of a simulated deadly weapon. *See Lee*, 236 Ariz. 377, ¶ 23, 340 P.3d

at 1092 (presuming legislature "was aware of [A.R.S.] § 13-604 or its precursor . . . when it enacted" § 13-501). Had the legislature intended to restrict armed robbery for purposes of § 13-501(A) to situations in which an actual deadly weapon or dangerous instrument was involved, "presumably [it] would have . . . done so" in § 13-501(A)(4). *Id.*; *cf. Luchanski v. Congrove*, 193 Ariz. 176, ¶ 14, 971 P.2d 636, 639 (App. 1998) ("When the legislature has specifically included a term in some places within a statute and excluded it in other places, courts will not read that term into the sections from which it was excluded."). It could have included a limitation in § 13-501(A)(4) similar to the limitation it placed on aggravated assault but it chose not to do so. **¶20** When the armed robbery statute was amended in 1983, adding "or simulated deadly weapon," the legislature eliminated the distinction between an item fashioned as or appearing to be a deadly weapon and an actual one. *Id.*; *see also* 1983 Ariz. Sess. Laws, ch. 129, § 1. As the court in *Garza-Rodriguez* observed, "Both elements reflect the policy that the greater punishment is reserved to deter the dangerous person actually capable of inflicting death or serious bodily harm or intending to create a life endangering environment by carrying a deadly or simulated deadly weapon." 164 Ariz. at 111, 791 P.2d at 637. Whether a simulated or real weapon is present, a perpetrator has forced a victim to give up his or her property by threatening violence that the perpetrator appears to be capable of carrying out. Thus, the legislature intended no distinction between armed robbery committed with an actual deadly weapon or a simulated deadly weapon. *Id.*

Link to opinion: https://www.appeals2.az.gov/Decisions/SA20160012Opinion.pdf

***State v. Turner*, 1 CA-CR 2015-0477 (May 3, 2016):** Mr. Turner appealed his probation revocation, arguing A.R.S. § 13-902(C), allowing the court to extend probation when a defendant fails to pay restitution, does not allow the court to extend conditions of probation unrelated to restitution. He further argued his probation was unconstitutionally revoked because he had no notice that when his probation was extended, all the original conditions remained in place, including those unrelated to restitution. Holding: Turner misconstrued the statute; he had proper notice of the extension of his probation. Probation revocation affirmed.

¶7 ....By its plain language, § 13-902(C) thus authorizes the court to extend the "period" of probation when a defendant has failed to make restitution and limits the length of any such extension.

¶12 We find no support in the language or context of the respective statutes for Turner's argument that when the legislature authorized the court to extend the period of probation for a defendant's failure to pay restitution in § 13-902(C), it impliedly limited the broad discretion it granted the court in § 13-901(A) and (C) to determine the appropriate conditions of probation. *See State v. Sweet*, 143 Ariz. 266, 270 (1985) (under "accepted rule of statutory construction" of *in pari materia*, court may consider other relevant statutes). Instead, by authorizing the court to extend the "period" of probation, the legislature intended in § 13-902(C) to permit the court to extend the duration of all of the conditions of a defendant's probation, not only the condition requiring restitution.

¶14 Due process requires notice to a defendant before his probation period is extended. *Korzuch*, 186 Ariz. at 193. Turner contends that the order extending his probation did not give him notice that the extension applied to the non-restitution conditions…

¶15 The language of the order does not support Turner's interpretation. The order first states that Turner's "probation term is extended for five years." Depending on the context, a probation "term" might mean either a condition of probation (i.e., a "term of probation") or the period (duration) of probation. Here, however, the words "extended" ("probation term is extended for five years") and "extension" ("extension of the probation term") make clear that the court meant "term" to refer to a period of time, i.e., the duration of probation, rather than any condition of probation…

¶16 Finally, Turner's actions following the extension demonstrate he understood that all the conditions of his probation had been extended. As noted above, two years after the court extended Turner's probation pursuant to § 13-902(C), Turner admitted he had failed to comply with a condition of his probation requiring him to submit to drug and alcohol testing, an admission reflecting that he knew that he remained subject to conditions of probation other than the obligation to pay restitution. Additionally, following that violation hearing, Turner signed a document titled Uniform Conditions of Supervised Probation, which listed all of his various probation conditions, a document titled Special Conditions of Probation, and two Implementation of Conditions of Probation, all of which explained

Turner's obligation to comply with specified probation conditions other than restitution. Thus, the record reveals that, contrary to his current contention, he knew that all the prior conditions of probation remained in effect.

Link to opinion: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1%20CA-CR%2015-0477.pdf

***State v. Primous*, 1 CA-CR 2015-0181 (May 5, 2016):** Mr. Primous appealed the trial court's denial of his motion to suppress when police frisked him for weapons, felt a bulge in his front pocket, and reached in and pulled out a baggie of marijuana. Holding: "Although we reject frisks of lawfully detained individuals' companions as a matter of course," based on the totality of the circumstances in this particular case, the frisk was justified and the seizure of the marijuana was lawful.

¶10 An individual's presence in a dangerous neighborhood is not, by itself, sufficient to establish a reasonable, particularized suspicion that he is committing or has committed a crime. *Brown v. Texas*, 443 U.S. 47, 52 (1979). That was the situation when Ohland and Casillas first approached Defendant. Defendant was seated with a child in front of a residence, in daylight hours, engaged in conversation with a few others. He exhibited no evasive or aggressive behavior, was not visibly armed, and neither he nor, apparently, the others in the group matched the description of the dangerous person the officers sought. His mere presence outside of a camera-outfitted apartment in a high-crime neighborhood was insufficient to create a reasonable suspicion that he was committing or had committed a crime.

¶11 But then one of Defendant's companions fled, and another was discovered to have a small baggie of marijuana in his pocket. Unprovoked flight "is not necessarily indicative of wrongdoing, but it is certainly suggestive of such," and it may be considered in connection with the character of the neighborhood. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). And knowing possession of marijuana is often a crime. A.R.S. § 13-3405(A)(1). The question is whether the suggestion of wrongdoing created by Defendant's companions justified a frisk of Defendant, who remained seated and gave no indication of complicity in either the flight or the drug possession.

¶12 In similar circumstances, some jurisdictions have permitted officers to frisk a lawfully detained person's companions as a matter of course. *See Perry v. State*, 927 P.2d 1158, 1163-64 (Wyo. 1996) (collecting cases). We previously expressed approval for such a rule in dictum in *State v. Clevidence*, 153 Ariz. 295, 298 (App. 1987). But we reject it now. Like the Sixth Circuit, "we do not believe that the *Terry* requirement of reasonable suspicion under the circumstances…has been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates." *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985) (citation omitted). This approach is consistent with *Ybarra v. Illinois*, in which the Supreme Court invalidated the frisk of an apparently innocuous bar patron during the execution of a search warrant on the bartender and bar, holding that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." 444 U.S. 85, 88, 91 (1979).

¶13 The absence of a *per se* rule authorizing frisks of a suspect's companions does not, however, end the inquiry. We cannot say that the character or conduct of a person's companions has *no* bearing on the question whether officers may frisk the person. *Bell*, 762 F.2d at 500 ("[T]he fact of companionship…is not irrelevant to the mix that should be considered in determining whether the agent's actions were justified."). Companionship with a suspected criminal may, in view of the totality of the circumstances, justify a protective stop and frisk even absent a particularized reasonable suspicion that the person to be searched is committing or has committed a crime…The focus of the inquiry becomes officer and public safety. *See* 4 Search & Seizure § 9.6(a). In *Arizona v. Johnson*, for example, the Supreme Court held that the driver and all passengers of a vehicle may be detained during a traffic stop, even absent cause to suspect their involvement in criminal activity, if the police "harbor reasonable suspicion that the person subjected to [a] frisk is armed and dangerous." 555 U.S. at 327. In assessing potential dangerousness, the police may consider factors such as the nature of the person's companionship with a suspected criminal, the environment, and the number of officers present…

¶14 Despite Defendant's passivity and the absence of any objective evidence of criminal collusion with his companions, we cannot say that Ohland unreasonably suspected that Defendant might be armed and dangerous. Ohland knew that he was in a dangerous neighborhood looking for a dangerous individual who dealt drugs and weapons. He knew that Defendant had just been talking with several men, one of whom had fled without provocation and another of whom possessed marijuana. He also knew that he was in view of cameras

and that he and Casillas were outnumbered by Defendant and his group. On these facts, Ohland justifiably frisked Defendant for weapons. And under the "plain feel" doctrine, he lawfully removed the baggie of marijuana from Defendant's pocket. *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) ("If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context."). The superior court did not err by denying Defendant's motion to suppress the marijuana.

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1CA-CR15-0181.pdf

***State v. O'Laughlin*, 2 CA-CR 2015-0134 (May 5, 2016):** Mr. O'Laughlin appealed his conviction for burglary and possession of burglary tools, contending the trial court erred by adding "and/or" to the list of burglary tools on the verdict form, and alternatively, if "and/or" was proper the indictment was duplicitous because the jurors were not unanimous as to which tool he possessed. Holding: "Although we discourage the omission of a conjunction in a charging document and the use of 'and/or' in jury instructions to remedy the ambiguity caused by the missing conjunction, in this case we find no error and affirm." O'Laughlin also argued there was insufficient evidence to support a guilty verdict for possession of burglary tools, but the Court disagreed.

¶5 We begin with the question of whether the indictment was duplicitous because it guides our analysis of the other arguments. A duplicitous indictment is one that on its face alleges multiple distinct and separate offenses in one count. *State v. Klokic*, 219 Ariz. 241, ¶ 10, 196 P.3d 844, 846 (App. 2008). Duplicitous indictments may prejudice a defendant by not providing adequate notice of the charge to be defended, presenting the risk of a non-unanimous jury verdict, and making impossible the precision needed to assert double jeopardy in a later prosecution. *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989). An indictment is not duplicitous, however, if a count alleges only one offense, even if that offense may be committed in different ways. [Citations omitted.]

¶7 Several recent duplicity cases illustrate that the distinction between a single-offense and multiple-offense statute often relies on the harm resulting from the crime. In *Paredes-Solano*, the defendant was charged with sexual exploitation of a minor under A.R.S. § 13-3553 arising from acts described in paragraphs (A)(1) and (A)(2) of that section. 223 Ariz. 284, ¶ 16, 222 P.3d at 906. The state regarded the acts as describing a single offense, arguing to the jury it did not have to differentiate between or agree on acts described in (A)(1) versus (A)(2). *Id.* ¶ 14. Based on statutory analysis and legislative history, we concluded the legislature separated (A)(1) and (A)(2) acts in order to create two separate offenses, albeit described in a single statute. *Id.* ¶¶ 9-15. Paragraph (A)(1) involves harm to a child by creating a sexually exploitive image, whereas (A)(2) involves perpetuating the harm by distributing the image. *Id.* ¶ 10. Because the jury was permitted and encouraged to reach non-unanimous decisions involving separate offenses that were charged in a single count, the defendant's right to a unanimous verdict was violated. *Id.* ¶¶ 18, 22. That violation of a constitutional right constituted fundamental and reversible error. *Id.* ¶ 22, *citing* Ariz. Const. art. II, § 23.

¶8 In contrast, *State v. Delgado* illustrates the lack of duplicity when an offense is a single crime. 232 Ariz. 182, ¶¶ 20-24, 303 P.3d 76, 82-83 (App. 2013). In that case, the defendant was charged with aggravated assault pursuant to A.R.S. § 13-1204(B), a subsection specifically addressing strangulation or suffocation. 232 Ariz. 182, ¶¶ 20-21, 303 P.3d at 82. There were three means of committing the offense: intentionally, knowingly, or recklessly causing physical injury; intentionally placing the other person in reasonable apprehension of imminent physical injury; or, knowingly touching another with intent to injure. *Id.* ¶ 21. This mirrors the language of the simple assault statute, which has been interpreted as listing three separate crimes. *Id.* ¶ 22. Unlike a simple assault, however, where the harm could be injury, apprehension of injury, or touching with intent to injure, *see* A.R.S. § 13-1203(A), there was a single harm under § 13-1204(B)—impeding the normal breathing or circulation of blood of another person. *Delgado*, 232 Ariz. 182, ¶¶ 22-23, 303 P.3d at 82-83. The court held that § 13-1204(B) was a single offense and the jury was not required to agree on the underlying "'form'" of assault. *Delgado*, 232 Ariz. 182, ¶ 24, 303 P.3d at 83.

¶10 Here, the purpose of the burglary tools statute is to prevent a person who has formed the intent to commit burglary from possessing any tool that will aid him in unlawfully entering

a structure to commit a theft or other felony. *See State v. Brown*, 37 P.3d 572, 583 (Haw. Ct. App. 2001) ("'[T]he purpose of all [burglary tools] statutes is to deter or prevent the commission of burglary and related offenses by enabling enforcement authorities to act before the prospective burglar has had the opportunity to gather his [or her] tools, weapons, and plans and strike in secret.'")… Whether a person with the intent to commit a burglary possesses a flashlight, gloves, or a knife does not alter the harm. *See Payne*, 233 Ariz. 484, ¶ 88, 314 P.3d at 1264.

¶12 *Dixon* guides our classification of § 13-1505 as a single offense that can be committed with multiple tools. Because it is a single offense, the indictment was not duplicitous. Further, the jury was instructed that possession of burglary tools required proof that O'Laughlin "possessed any tool, instrument, or other article adapted or commonly used for committing burglary; *and*… intended to use or permit the use of such an item in the commission of a burglary." This correctly stated the law and was sufficient to ensure that all jurors concluded beyond a reasonable doubt that he possessed a burglary tool with the requisite mental state.

¶14 …We conclude that because the charge omitted a conjunction, it could be read in the conjunctive or disjunctive. Thus, the trial court did not abuse its discretion by denying O'Laughlin's implied request that the word "and" be added to the verdict form and granting the state's request to include "and/or."

Link to opinion: https://www.appeals2.az.gov/Decisions/CR20150134Opinion.pdf

***State v. Stoll*, 2 CA-CR 2015-0280 (May 23, 2016):** Kyle Stoll's conviction and sentence for Agg. DUI were vacated because the trial court erred in denying Mr. Stoll's motion to suppress. Relying on *Heien v. North Carolina*, ___ U.S. ___, 135 S. Ct. 530 (2014), the trial court found the officers misinterpreted the relevant statutes, but the mistake of law was objectively reasonable. Holding: Because the officers' mistake of law was **not** objectively reasonable, the stop lacked reasonable suspicion. "*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute." ¶20. Here, the relevant statutes were unambiguous, and "the fact that the department had trained its officers in a way that permitted a misreading of § 28-931 does not make that misreading objectively reasonable." *Id.*

¶4 Stoll moved to suppress the evidence seized during the stop, arguing that the deputies' belief about white light from a license plate light was not supported by any statute. The state contended the stop was supported by reasonable suspicion because the SUV's license plate lamp, though functioning properly and apparently as designed, did not have an opaque casing entirely shrouding its back, and thus emitted some white light to the rear of the vehicle. After taking the matter under advisement, the trial court granted Stoll's motion to suppress. Its ruling that the license plate light did not violate Title 28 was based on specific facts:

> There was no evidence that the [license plate] light created any public safety or community welfare concern. There was no evidence that the lamp obstructed the vision of other drivers or that other drivers might confuse the license lamp with a head light or backup light. The white lamp was simply "visible" from the rear of Defendant's vehicle.

¶5 In December 2014, shortly after the United States Supreme Court issued its decision in *Heien v. North Carolina*, ___ U.S. ___, 135 S. Ct. 530 (2014), the state moved for reconsideration of the suppression ruling, arguing the deputies made a reasonable mistake of law in interpreting § 28-931(C) when they concluded Stoll's license plate lamp violated state law. Stoll contended the statute clearly and unambiguously compels a conclusion that the lamp was not in violation, and the deputies' interpretation of the statute was not objectively reasonable. At the hearing on the motion for reconsideration, a patrol commander from the sheriff's department testified that the department had trained deputies for years that any rear-facing white light on a vehicle other than a backup lamp violated § 28-931(C). The trial court granted the state's motion to reconsider…[finding] "the Officer was objectively reasonable in applying the laws [as] he believed [them] to be at the time, particularly given his training in the Department."

¶8 Arizona law requires that a lamp, either separate or incorporated in the tail light, be placed on a vehicle "in a manner that illuminates with a white light the rear license plate and renders it clearly legible from a distance of fifty feet to the rear." A.R.S. § 28-925(C)….§ 28-931(C)(2) requires only that the license plate lamp and backup lamp shall cast white light as opposed to red.

¶12 …In short, we agree with Stoll that his license plate lamp was in compliance with all relevant Arizona law. No Arizona statute prohibits a license plate lamp

from emitting some white light to the rear of a vehicle, without more. Therefore, the deputy did not articulate a legally correct statutory basis to investigate Stoll's vehicle.

¶15 In *Heien v. North Carolina*, the United States Supreme Court held reasonable suspicion supporting a traffic stop can rest upon a reasonable mistake of law. ___ U.S. at ___, 135 S. Ct. at 536…The Court emphasized, however, that "[t]he Fourth Amendment tolerates only *reasonable* mistakes" of law, and "those mistakes . . . must be *objectively* reasonable." *Id.*; *accord Moreno*, 236 Ariz. 347, ¶ 10, 340 P.3d at 430-31. Our inquiry is exclusively objective—the court will not examine "the subjective understanding of the particular officer involved." *Heien*, ___ U.S. at ___, 135 S. Ct. at 539. If the statute the officer interpreted mistakenly "is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not." *Id.* at ___, 135 S. Ct. at 541 (Kagan, J., concurring).

¶17 The state's interpretation distinguishing direct light from reflected light lacks a textual basis. In fact, by its terms, § 28-931(C) regulates the color of rear lamps without regard to whether their light is "display[ed] or reflect[ed]." The statute only regulates the color of rear-facing lights and we decline the state's implicit request to add words to it. *See Arpaio v. Steinle*, 201 Ariz. 353, ¶ 1, 35 P.3d 114, 115 (App. 2001).

¶18 …Under the state's reading, unless a vehicle's license plate lamp is shielded with such precision as to emit white light only onto the license plate itself and nowhere else—not even elsewhere on the rear of the vehicle—the lamp does not comply with § 28-931(C). The state provides no authority for this reading other than the deputies' own interpretation. Furthermore, "that possibility proves too much." *United States v. Flores*, 798 F.3d 645, 649-50 (7th Cir. 2015). It would follow that virtually every vehicle on our streets is in violation of § 28-931(C) and could be stopped any time it is dark outside…We must avoid a construction of § 28-931(C) that leads to an absurd result…

¶19 The state further argues the deputies' reading is reasonable because other drivers could confuse a license plate lamp emitting white light directly to the rear for an illuminated backup lamp, creating a risk that they might incorrectly conclude the vehicle is in reverse. *See* § 28-940(3) ("[A] backup lamp shall not be lighted when the motor vehicle is in forward motion."); *see also* § 28-931(C)(2) (backup lamp and license plate light both white). This construction effectively prohibits any white light shining directly to rear while the vehicle is moving forward. However, § 28-931(C) is to the contrary because it exempts the license plate lamp from the general injunction that rear-mounted lighting devices shall be red. No alternative reading is reasonable…

¶20 We agree with the Seventh Circuit's reasoning that "*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute." *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016); *compare United States v. Alvarado-Zarza*, 782 F.3d 246, 249-50 (5th Cir. 2015) (mistake of law not objectively reasonable where statute is "unambiguous" and "facially gives no support" to officer's interpretation), *with Heien*, ___ U.S. at ___, 135 S. Ct. at 540 (mistake of law objectively reasonable where ambiguous statutory language, not yet interpreted by courts, fairly allowed two different readings). Nor does the testimony of the patrol commander at the hearing on the motion for reconsideration regarding officer training affect our analysis. As Justice Kagan noted in *Heien*, "an officer's reliance on 'an incorrect memo or training program from the police department' makes no difference" for purposes of our strictly objective inquiry. ___ U.S. at ___, 135 S. Ct. at 541 (Kagan, J., concurring), *quoting State v. Heien*, 737 S.E.2d 351, 360 (N.C. 2012) (Hudson, J., dissenting); *accord id.* at ___, 135 S. Ct. at 539-40 (majority opinion). Put another way, the fact that the department had trained its officers in a way that permitted a misreading of § 28-931 does not make that misreading objectively reasonable. *See Stanbridge*, 813 F.3d at 1037; *see also Heien*, ___ U.S. at ___, 135 S. Ct. at 539-40 ("[A]n officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."). Accordingly, we conclude the trial court erred in finding the officer's interpretation of the statute objectively reasonable under *Heien*.

Link to opinion: https://www.appeals2.az.gov/Decisions/CR20150280opinion.pdf

***Special Action—Allen v. Hon. Sanders/State*, 1 CA-SA 2016-0049 (May 26, 2016):** Sammantha and John Allen, co-defendants in a capital murder case, petitioned for special action to challenge the trial court's refusal to independently determine whether probable cause existed for child abuse offenses alleged by the State as aggravating circumstances for sentencing purposes. Holding:

Sanchez v. Ainley, 234 Ariz. 250, 321 P.3d 415 (2014), requires the trial court to make its own independent probable cause determination on alleged aggravating circumstances; thus, the trial court deprived the Allens of their due process rights when it refused to independently determine whether probable cause supported the "serious offense" aggravating circumstances alleged by the State.

¶4 The State filed notices of intent to seek the death penalty for both Sammantha and John, alleging several aggravating circumstances. The State alleged that the counts of child abuse filed separately against Sammantha and John constituted aggravating circumstances under A.R.S. § 13–751(F)(2). That statute provides, as relevant here, that convictions for serious offenses not committed on the same occasion as a homicide but consolidated for trial with the homicide constitute aggravating circumstances for determining whether the death penalty should be imposed as punishment for the homicide. *Id.* A conviction for child abuse, a dangerous crime against children, A.R.S. § 13–3623(A)(1), is by definition a "serious offense," A.R.S. § 13–751(J)(6).

¶7 In *Chronis*, the Arizona Supreme Court held that "Arizona Rule of Criminal Procedure 13.5(c) permits a defendant in a capital murder case to request a determination of probable cause as to alleged aggravating circumstances." 220 Ariz. at 560 ¶ 1, 208 P.3d at 211. In *Sanchez*, the Court expanded on *Chronis* and held that "the trial court must grant a defendant's timely request for a hearing under Rule 13.5(c), even if the grand jury has previously made a probable-cause determination as to those alleged aggravating circumstances." 234 Ariz. at 252 ¶ 1, 321 P.3d at 417. The Court stated that no statute or rule authorized a grand jury to determine whether probable cause supported aggravating circumstances alleged in capital cases. *Id.* at 253–54 ¶ 13, 321 P.3d at 418–19. The Court reasoned that grand jurors are authorized to inquire into offenses and return indictments for public offenses, but "'aggravating circumstances' do[] not fall within this definition because they merely guide sentencing determinations and do not proscribe conduct that is punishable by a term of imprisonment or fine." *Id.* at 253 ¶ 8, 321 P.3d at 418. However, the Court emphasized that "even if the grand jury were authorized to determine that probable cause supports alleged aggravators, [a defendant] would be entitled to a *Chronis* hearing" because a capital defendant's right "to challenge the legal sufficiency of an aggravator is neither conditioned on whether a grand jury has addressed the aggravator nor affected by the grand jury's findings." *Id.* at 254 ¶ 14, 321 P.3d at 419.

¶8 Because grand jury findings do not affect a capital defendant's right to challenge the legal sufficiency of evidence supporting the allegation of aggravating circumstances, the trial court must make an independent probable cause determination on aggravating circumstances. The trial court here did not do so and instead accepted the grand jury's probable cause determination on the child abuse offenses as a probable cause determination on the "serious offense" aggravating circumstances. This contradicts the supreme court's holding in *Sanchez*.

¶9 We recognize that this may be procedurally burdensome and inefficient for the State. The State will often present to the trial court the same evidence to support probable cause for the aggravating circumstance that it presented to the grand jury to support probable cause for the underlying offense. Nevertheless, *Sanchez* requires this procedure, "reflecting th[e Arizona Supreme] Court's objective to afford greater procedural rights to a defendant facing the death penalty," 234 Ariz. at 254 ¶ 15, 321 P.3d at 419, and it must be followed. Following the *Sanchez*-mandated procedure gives a capital defendant the opportunity to review the evidence the State presents to support probable cause on the aggravating circumstances, to cross-examine witnesses, and to present rebuttal evidence—an opportunity not available in grand jury proceedings. *Id.* This opportunity means nothing, however, if the trial court does not then independently determine probable cause. Consequently, the trial court denied the Allens the benefit of a *Chronis* hearing on the "serious offense" aggravating circumstances.

¶10 The trial court attempted to distinguish *Sanchez* on grounds that (1) Sammantha and John were afforded a *Chronis* hearing; (2) the grand jury here did not previously find probable cause on the child abuse offenses as alleged aggravating circumstances; and (3) *Sanchez* does not allow a defendant to have the trial court redetermine a grand jury's probable cause determination on public offenses. The trial court's distinctions, however, do not alter *Sanchez*'s specifically articulated holding that grand jury determinations of probable cause do not satisfy a capital defendant's right to have the trial court independently determine probable cause on aggravating circumstances. First, simply providing the Allens a *Chronis* hearing does not satisfy *Sanchez* if the trial court does not independently determine

probable cause on aggravating circumstances. Second, although the grand jury determined probable cause on the child abuse offenses as public offenses and not as aggravating circumstances, this does not alter the trial court's duty under *Sanchez* to independently determine whether probable cause supported the offenses as aggravating circumstances. Third, although the grand jury found probable cause on the alleged public offenses of child abuse, the Allens are not seeking the redetermination of the grand jury's findings, but the trial court's determination in the first instance—as *Sanchez* requires—whether probable cause supports the aggravating circumstances. A capital defendant has the right to require the trial court to determine probable cause on aggravating circumstances in a *Chronis* hearing, even if the circumstances also constitute public offenses that have been subject to a grand jury's probable cause determination.

¶11 The State counters that the trial court had sufficient evidence to find probable cause for the child abuse offenses as alleged aggravating circumstances and that the court properly did so. But this argument fails because the trial court's ruling explicitly stated that the court was accepting the grand jury's probable cause determination. Specifically, the court stated the "grand jury's finding of probable cause respecting [the child abuse offenses] of the Indictment is sufficient to establish probable cause respecting those charges and because they are 'serious offenses' under the statute, the Court finds there is probable cause to proceed on the aggravating factor of a 'prior serious offense.'" Consequently, because the trial court gave conclusive effect to the grand jury's probable cause determination for the child abuse offenses, instead of independently determining whether probable cause supported the child abuse offenses as aggravating circumstances for sentencing purposes in this capital case, the trial court erred.

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1%20CA-SA%2016-0049.pdf

***State v. Wasbotten*, 1 CA-CR 2015-0559 (May 31, 2016):** The State appealed the trial court's suppression of contraband discovered in an inventory search of a rental truck. The State argued (1) Mr. Wasbotten lacked standing to challenge a search of a rented vehicle because he was not an authorized driver under the rental agreement; and (2) The rental truck was properly impounded pursuant to A.R.S. § 28-3511 (requiring impoundment of a vehicle driven by a person with a suspended or revoked license), and the search was a valid inventory search. Holding: The driver of a rental vehicle, driving with the renter's permission but not authorized by the rental agreement, is not *per se* without standing to challenge a vehicle search. Rather, if an authorized driver under the rental agreement gives permission for another person to drive the vehicle, that person may have a legitimate expectation of privacy at least as he drives the vehicle. However, A.R.S. § 28-3511 does not require that the person with a suspended license be driving the moment the vehicle is stopped. Here, where a renter with an invalid license was observed driving a rental truck shortly before the truck was actually stopped (at which time Wasbotten, who did have a valid driver's license, was driving the truck), the impound and inventory search were lawful. The Court of Appeals reversed the trial court's suppression order and remanded for further proceedings.

¶4 Wasbotten moved to suppress the methamphetamine and paraphernalia found in the truck. He argued that because A.R.S. § 28-3511 states that law enforcement may impound the vehicle if "[a] person *is driving*" with driver's license suspended or revoked, the unlicensed driver must be driving at the time of the stop. (Emphasis added.) Because Wasbotten -- not Daniels -- was driving with a valid license at the time of the stop, he contends that the officer could not legally have impounded the vehicle. If the impound was not legal, he reasons, the inventory search would not have been legal, and any evidence obtained from the search should be suppressed. The state contested Wasbotten's standing to challenge the search, on the ground that Wasbotten had no possessory interest in the truck and therefore had no reasonable expectation of privacy.

¶5 The court, following the Ninth Circuit's decision in *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006), ruled that Wasbotten had standing to challenge the search because he had "permission [to drive the vehicle] granted by the authorized renter." The court also concluded that the impoundment was illegal because A.R.S. § 28-3511 requires that law enforcement stop a driver with the suspended or revoked license while she is driving as a precondition to impounding her vehicle. The court granted Wasbotten's motion to suppress and the state successfully moved to dismiss the case.

¶7 The state urges us to adopt the "bright line" rule from the Third, Fourth, Fifth, and Tenth Circuits that a driver who is unauthorized by the rental agreement has no reasonable expectation of privacy and no standing to challenge a search of the vehicle. [Citations

omitted.] We reject the notion that a driver's constitutional expectation of privacy hinges on a contractual relationship with a rental car company; we instead follow the approach of the Eighth and Ninth Circuits. *See United States v. Muhammed*, 58 F.3d 353, 355 (8th Cir. 1995); *Thomas*, 447 F.3d at 1198-99.

¶8 In *Thomas*, the Ninth Circuit held that "it cannot be said that a defendant's privacy interest is dependent simply upon whether the defendant is in violation of the terms of [a] lease agreement. . . . Rather, an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter." 447 F. 3d at 1198-99; *see also Muhammed*, 58 F.3d at 355 (standing requires permission from the renter, but not the rental car company). The state contends that Wasbotten, as a "brief and transitory" driver and a passenger of the authorized user, had less of a connection to the vehicle than the defendant in *Thomas*. We disagree. In *Thomas,* the defendant's standing to challenge a search depended not on how long he had driven the vehicle or whether others accompanied him but whether he had permission to drive the vehicle. Thomas failed to prove that he had such permission. *Id.* at 1199. But in this case there is no dispute that Daniels gave Wasbotten permission to drive the vehicle. Wasbotten had at least joint control of the vehicle, and he therefore had standing to challenge the search under *Thomas*.

¶9 The state also contends that even if Wasbotten has standing to challenge the search, the inventory search following impound of the vehicle was proper. On this point, the state is correct. The impound statute reads: "A peace officer shall cause the removal and either immobilization or impoundment of a vehicle if the peace officer determines that: [ ] A person is driving the vehicle while any of the following applies: . . . the person's driving privilege is suspended or revoked for any reason." A.R.S. § 28-3511(A)(1)(a)…

¶10 The trial court ruled the impoundment was unlawful because "[t]he person with a suspended license was not driving the vehicle at the time the officers had cause to stop the vehicle. Although the officers had previously observed [Daniels] driving, 'is' does not mean 'was.'" This is too restrictive a reading of the statute's plain language. The statute's use of the present progressive phrase "is driving" requires that the driving occur while her license is suspended or revoked. A.R.S. § 28-3511(A)(1)(a). It does not require driving at the moment of the actual stop by the peace officer. The opposite construction would lead to absurd results – under Defendant's interpretation, an individual with a suspended license could avoid impoundment simply by pulling onto a side street and exiting the vehicle before law enforcement initiated contact. We find no support in the statutory language for such an outcome.

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1CA-CR15-0556.pdf

***Simpson v. Hon. Miller/State of Arizona*, 1 CA-SA 2015-0292 and *Martinez v. Hon. Steinle/State of Arizona*, 1 CA-SA 2015-0295 (consolidated) (June 14, 2016):**

***Hopefully you know about this case already. MCPD has a team of attorneys discussing this case, what it means, and how we can react to it. Click the link to read the opinion, and be on the lookout for practice pointers and informational sessions about this recent opinion.*

¶1 These special actions require us to determine the constitutional minimum requirements for bail hearings when a statute makes certain serious offenses nonbailable. The petitioners were each charged with sexual conduct with a minor under the age of 15 and were denied bail under A.R.S. § 13-3961(A)(3). We do not hold that the petitioners were entitled to bail, but that they were entitled to hearings at which the judges could consider whether any release conditions could protect the victims and the community.

¶3 Because the categorical rule established by § 13-3961(A)(3) requires denial of bail without considering whether any release conditions could ensure victim and community safety, it is facially unconstitutional under Salerno.

¶23 We accept jurisdiction and grant relief. A.R.S. § 13-3961(A)(3) and the corresponding portion of Ariz. Const. art. II, § 22(A)(1), violate the due process protections of the United States Constitution. Because the petitioners are charged with dangerous crimes against children, their bail-entitlement hearings should have been governed by A.R.S. § 13-3961(D).

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1CA-SA15-0292.pdf

***State of Arizona v. Emilio Jean*, 1 CA-CR 2014-0444 (June 21, 2016):** Mr. Jean appealed his convictions and sentences for money laundering, conspiracy to commit money laundering and transportation of marijuana, transportation of marijuana for sale over two pounds, and illegally

conducting an enterprise. On appeal, he argued the trial court erred by (1) admitting evidence of other acts under Arizona Rule of Evidence 404(b); (2) denying his motion to suppress evidence based on a lack of standing to challenge a warrantless GPS device; and (3) denying his motion for mistrial. Div. 1 found no error, affirming Jean's convictions and sentences.

[Regarding 404(b)]

¶7 Evidence of other crimes, wrongs or acts is admissible if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ariz. R. Evid. 404(b). The trial court did not abuse its discretion when it held the State proved by clear and convincing evidence the Missouri incident occurred and Jean was involved, not merely present, and that the incident was relevant to prove Jean's knowledge in the current case. *See State v. Prion*, 203 Ariz. 157, 163, ¶ 37 (2002) ("For other act evidence to be admissible, it must be shown by the clear and convincing standard that the act was committed and that the defendant committed it."). Clear and convincing evidence is evidence that makes the proposition "highly probable." *State v. Renforth*, 155 Ariz. 385, 388 (App. 1987) (citation omitted). Clear and convincing evidence need not, however, "establish that it is certainly or unambiguously true." *State v. Vega*, 228 Ariz. 24, 29 n.4, ¶ 19 (App. 2011).

¶8 The testimony of the Missouri officer, combined with other documentary evidence regarding the Missouri incident, was sufficient to permit the trial court to find it "highly probable" the Missouri incident occurred and that Jean was involved. The trial court did not abuse its discretion when it also determined the Missouri incident was not too remote in time. "Although remoteness between the two incidents affects the weight to be given the testimony by the jury, it generally does not determine its admissibility." *Van Adams*, 194 Ariz. at 416, ¶ 24. We have held that acts which occurred much more than eleven years prior to the charged offenses were not too remote. *See State v. Weatherbee*, 158 Ariz. 303, 304-05 (App. 1988) (holding prior acts that occurred twenty-two years before trial were not too remote to be admitted at trial); *State v. Salazar*, 181 Ariz. 87, 92 n.5 (App. 1995) (finding a prior act that occurred twenty years before the charged offense was relevant). The trial court did not abuse its discretion in finding that the eleven years that elapsed between the Missouri incident and the charged offenses did not render the Missouri incident too remote.

¶9 Regarding the danger of unfair prejudice, there is no question but that evidence of the Missouri incident was prejudicial to Jean. However, not all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent. The use of the word "prejudicial" for this class of evidence, while common, is inexact. "Prejudice," as used in this way, is not the basis for exclusion under Rule 403. *State v. Schurz*, 176 Ariz. 46, 52 (1993) (citations omitted). "[A]ll good relevant evidence" is "adversely probative." *Id.* "Unfair prejudice" is prejudice that could cause a jury to render a decision on an improper basis, "such as emotion, sympathy or horror." *Id.*

¶10 The trial court did not abuse its discretion when it determined the probative value of the evidence of the Missouri incident was not substantially outweighed by the danger of unfair prejudice. Moreover, the trial court gave an instruction that directed the jury to consider the Missouri incident only as it might show Jean's motive, intent, preparation, plan, knowledge, absence of mistake or accident. We presume juries follow their instructions. *State v. Dunlap*, 187 Ariz. 441, 461 (App. 1996).

[Regarding Motion to Suppress]

¶13 Jean relies upon the decisions in *United States v. Jones*, 132 S.Ct. 945 (2012), and *State v. Mitchell*, 234 Ariz. 410 (App. 2014), to argue that the warrantless placement of a GPS to monitor an individual's movements is an unlawful search under the Fourth Amendment. *Jones* held for the first time that the installation of a GPS on a vehicle constituted trespass, and the use of a GPS to monitor the vehicle's movements constituted a search under the Fourth Amendment. *Jones*, 132 S.Ct. at 949… **Note 4: *Jones* was decided after DPS officers placed the GPS on the truck in this case but before trial began.

¶14 The trial court found Jean did not own or have a possessory interest in the truck, and on that basis, held Jean had no standing to challenge the placement of the GPS because he had no "reasonable expectation of privacy in a vehicle that he was just a passenger in." Jean argues on appeal, however, that as a co-driver, he had as much of a possessory interest in the truck as the defendants in *Jones* and *Mitchell*, neither of whom owned the vehicle they drove.

¶16 In *Mitchell*, we held that "lawful possession" of a vehicle when the GPS is installed "is sufficient to confer upon a defendant standing to challenge GPS tracking" under *Jones*. 234 Ariz. at 416, ¶ 17. We explained that standard "is consistent with basic principles of tort law

regarding trespasses." *Id.* at ¶ 18. Under those principles, a bailor or a bailee of chattel could maintain a trespass; we concluded the same status confers standing to challenge a trespass and resulting search under *Jones*. *Id.*

¶17 The defendants' rights as bailees in *Jones* and *Mitchell* gave them standing to challenge the warrantless placement of GPS devices on the vehicles. Jean, however, was not a bailee…

> To constitute a bailment there must be a delivery by the bailor and acceptance by the bailee of the subject matter of the bailment. It must be placed in the bailee's possession, actual or constructive. There must be such a full transfer, actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and [g]ive the bailee for the time being the sole custody and control thereof….

¶18 Here, there is no evidence the owner of the truck made a "full transfer" of the truck to Jean, nor is there any evidence of a delivery and acceptance. There is no evidence the owner placed the truck in Jean's actual or constructive possession so "as to exclude the possession of the owner and all other persons and give [Jean] for the time being the sole custody and control thereof." *Id.* There is no evidence Jean ever had exclusive use of the truck nor evidence he ever had permission to drive the truck or actually drove the truck without the owner present. There is no evidence Jean ever possessed the keys to the truck. In sum, even if Jean may have occasionally operated the truck as a co-driver while in the owner's presence, there is no evidence the owner did not reserve his right to possess and control the truck at all times. Therefore, there is no evidence that Jean was a bailee of the truck. *State v. Orendain*, 185 Ariz. 348, 352 (1996) *overruled on other grounds* (holding that a defendant driving codefendant's vehicle lacked standing to assert Fourth Amendment challenge to the search of the vehicle when he had neither possessory nor property interest in the vehicle).

¶20 Finally, regarding Jean's claim that use of the GPS violated his reasonable expectation of privacy, Jean had no reasonable expectation of privacy in his movements as a passenger or driver of the truck. It is well settled that a person travelling in a vehicle on public roads has no reasonable expectation of privacy in the person's movements from one place to another. *United States v. Knotts*, 460 U.S. 276, 281 (1983). This court has held from this principle that there is no reasonable expectation of privacy that is infringed by GPS monitoring of a device placed on a vehicle, and that "[t]his is true particularly where the government's monitoring is short-term." *State v. Estrella*, 230 Ariz. 401, 404 (App. 2012). Given that authorities monitored the truck in which Jean was riding for only two days, we conclude he established no Fourth Amendment violation.

[Regarding Motion for Mistrial]
¶21 Jean argues the trial court erred when it denied his motion for mistrial after the owner of the truck referred, during his testimony, to other trips made to transport marijuana that were not part of the charged offenses. Jean objected when the truck's owner first referred to other trips in which he and Jean transported marijuana. The trial court sustained the objection, granted Jean's motion to strike the testimony and instructed the jury accordingly.

¶22 The owner later testified "we" made "so many trips" from Atlanta and "we" usually stopped for fuel in Texas. Jean did not object, but he asked the court and the State to admonish the owner again to not mention unrelated trips. The State admonished the owner accordingly. Later in the owner's testimony, when there was confusion as to whether he and Jean made two trips to Tucson in one day as part of the charged offenses, the owner testified, "[w]e usually often did." He further testified that "[i]t was [sic] so many trips that same way that they all kind of blurred together."

¶23 Jean again did not object, but stated that if this kept occurring he would move for a mistrial. The court again admonished the owner not to talk about anything outside the scope of the question. Later, when he explained the route he planned to take for the trip at issue, the owner testified that "we always used to take a cutoff and make a round – around the weigh station from Arizona and New Mexico." Jean moved for a mistrial based on the owner's references to unrelated trips and the inference that Jean participated in those trips. The court denied the motion but instructed the jury to disregard the testimony regarding how "we always used to take" a certain route.

¶25 The testimony at issue did not necessarily refer to other trips with Jean. The owner testified he had been involved in drug trafficking for several years and described his involvement in that trade before he met Jean. The owner also identified several other individuals he worked with when he transported marijuana by truck. The jury knew that over the course of several years, the owner had made a number of trips in

which he transported marijuana by truck with individuals other than Jean. Finally, the court struck the references Jean expressly objected to and instructed the jury to disregard them. Again, we presume juries follow their instructions. *Dunlap*, 187 Ariz. at 461. Under these circumstances, the trial court did not abuse its discretion when it denied Jean's motion for mistrial.

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR14-0444.pdf

***Woodington v. Browning*, No. 2 CA-SA 2016-0024 (June 22, 2016):** In this special action, Woodington challenged the judges' findings that he was not entitled to a second peremptory challenge to remove the assigned judge after Woodington was arraigned a second time, for the same case and cause number, after it was remanded to the grand jury and a new true bill was issued. The court accepted jurisdiction but denied relief, finding no abuse of discretion.

¶3 On March 21, Woodington filed a notice of change of judge pursuant to Rule 10.2, Ariz. R. Crim. P., requesting the respondent judge's removal from the case…The respondent judge denied the request, noting that Woodington previously had been indicted in the same cause number, "[t]he case ha[d] been assigned to [the respondent judge] since its inception," and "[t]he original case ha[d] never been dismissed." Citing *Godoy v. Hantman*, the respondent judge thus determined the notice was untimely. 205 Ariz. 104, 67 P.3d 700 (2003).

¶8 …He argues "[a]rraignment" in Rule 10.2(c) means any arraignment, including one after a motion pursuant to Rule 12.9, Ariz. R. Crim. P., is granted. The state, in contrast, asserts that "[a]rraignment" refers to the first arraignment in the case, the point at which a judge is assigned. Because the rule's language is reasonably susceptible to both interpretations, we consider other methods of construction to determine our supreme court's intent. *See State v. Jurden*, 237 Ariz. 423, ¶ 11, 352 P.3d 455, 458-59 (App. 2015).

¶10 …[W]hether a party is entitled to file a peremptory challenge following a subsequent arraignment turns upon whether that arraignment has taken place in the same "criminal case" or is part of a new "criminal case." Ariz. R. Crim. P. 10.2(a). In *Godoy*, on which Woodington relies, our supreme court addressed the second circumstance—a second arraignment that was part of a new proceeding. 205 Ariz. 104, ¶ 1, 67 P.3d at 701…

¶11 On review, our supreme court noted the question whether the state's peremptory challenge was timely "depends upon whether the subsequent indictment simply 'continued' the earlier action or instituted a new action" and the "resolution of this issue depends upon the effect of the trial court's order dismissing the action without prejudice." *Id*. ¶ 6. In holding the state was entitled to a change of judge under Rule 10.2, the court explained that, once the initial proceeding was dismissed, "nothing remained of that action" and, "[w]hen the new case began, Rule 10.2 provided each party a peremptory right to change the judge within the time permitted by the rule." *Id*. ¶ 8…

¶13 In view of Rule 12.9's language, we conclude our supreme court intended that a remand for a new determination of probable cause does not automatically trigger a new criminal case. Rather, the case simply continues unless the state fails to timely act, at which point the case "shall be dismissed without prejudice." Ariz. R. Crim. P. 12.9(c).

¶16 Having concluded that a remand pursuant to Rule 12.9 does not trigger a new criminal proceeding absent a dismissal, we necessarily conclude that "[a]rraignment" as used in Rule 10.2(c) refers only to the first arraignment in a case. The rule and our case law are clear that each party is only entitled to one peremptory challenge to a judge in a case, and, as described above, we conclude that a criminal case simply continues following remand for a redetermination of probable cause unless it is dismissed. Thus, a second arraignment in the same case does not trigger a new peremptory challenge.

Link to Opinion: https://www.appeals2.az.gov/Decisions/SA20160024Opinion.pdf

***State of Arizona v. Dustin Gill*, 1 CA-CR 2015-0509 (June 23, 2016):** Appealing his conviction for possession of marijuana, a class one misdemeanor, Mr. Gill argued the trial court erred by admitting his statements to a TASC representative during the deferred prosecution stage of his case. Finding no abuse of discretion, the Court of Appeals affirmed Gill's conviction.

¶3 When entering the TASC program, a TASC representative interviewed Gill and Gill filled out a "statement of facts" form. On that form, which Gill and his attorney signed, Gill indicated he understood his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and avowed that "I fully understand that what I have written here may be used against me in a court of law should I fail to satisfactorily complete the TASC

program." When asked about "the facts of the offense," Gill wrote on the form: "The marijuana was found in the bathroom on the ground in my possession."

¶4 Although Gill participated in the TASC program for a period of time, he failed to complete the requirements and the State resumed prosecution. After Gill then rejected another plea offer, he moved to suppress the "statement of facts" form and any testimony from TASC representatives regarding his admissions, claiming (as relevant here) they were inadmissible because they were made in the course of plea discussions. After full briefing, the superior court denied Gill's motion. After a bench trial, the court found Gill guilty… and placed him on one year of unsupervised probation…

¶5 Gill argues information he provided to TASC was not admissible at trial because they constitute "a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea." Ariz. R. Evid. 410(a)(4); *see also* Ariz. R. Crim. P. 17.4(f) (noting admissibility "of a plea, a plea discussion, and any related statement is governed by" Ariz. R. Evid. 410)…

¶7 First, Gill did not provide information to TASC "during plea discussions." Ariz. R. Evid. 410(a)(4). Although Ariz. R. Crim. P. 17.4 governs plea negotiations and agreements and refers to Ariz. R. Evid. 410, *see* Ariz. R. Crim. P. 17.4(f), the TASC program is part of a deferred prosecution governed by Ariz. R. Crim. P. 38, which does not reference Ariz. R. Evid. 410. Participating in a deferred prosecution program such as TASC, then, is not a plea negotiation or agreement subject to Ariz. R. Crim. P. 17.4 or Ariz. R. Evid. 410. In fact, Gill agreed to participate in the TASC program, and provided the statements challenged here, *after* he *rejected* a plea offer. Given that Gill rejected the plea offer before agreeing to participate in the TASC program, there were no plea discussions ongoing when he later provided TASC the statements he challenges here.

¶8 Second, there is no suggestion that Gill's statements were made "during plea discussions with an attorney for the prosecuting authority." Ariz. R. Evid. 410(a)(4). Gill has not shown that the TASC representative he spoke with, and provided the written "statement of facts" form to, was an attorney, let alone an attorney for the State as required by Ariz. R. Evid. 410(a)(4).

¶9 Third, even if Gill's statements met the requirements of Ariz. R. Evid. 410(a)(4), Gill waived those protections. A defendant can voluntarily waive the protections of Ariz. R. Evid. 410(a)(4). *State v. Campoy*, 220 Ariz. 539, 549-50 ¶¶ 30-34 (App. 2009) (citing *United States v. Mezzanatto*, 513 U.S. 196, 210-11 (1995), which interpreted Fed. R. Evid. 410). Gill did just that when he indicated he understood *Miranda* warnings listed on the TASC form and wrote "yes" and initialed next to the following: "I have made this statement without coercion and of my own free will. I fully understand that what I have written here may be used against me in a court of law should I fail to satisfactorily complete the TASC program." Only after that waiver did Gill provide the statements he challenges on appeal.

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR%2015-0509.pdf

***State of Arizona v. Hon. Hegyi/Josh Rasmussen*, 1 CA-SA 2016-0075 (June 23, 2016):** In this special action, the State challenged the trial court's denial of its motion to compel disclosure of un-redacted mental health evaluations of the defendant, whose defense is GEI (A.R.S. § 13-502). Holding: Once a defendant notices GEI as an affirmative defense, Rule 11.4(b) does not support redaction of statements he made to his own expert. Also, Rule 15.2(c) requires disclosure of un-redacted reports from both the court-appointed expert and the defendant's own expert. Div. 1 granted relief, reversing the trial court's order.

¶3 The State raised concerns about [the diagnosis made by the defense expert], and Rasmussen agreed to be evaluated by a court-appointed psychologist. The superior court appointed D.J. Gaughan, Ph.D., to perform the evaluation. After the evaluation, Dr. Gaughan agreed Rasmussen met the guilty except insane criteria. Rasmussen, upon request, provided a copy of both doctors' notes and data to the State, but redacted statements he made to both psychologists.

¶4 The State then moved to compel disclosure of Rasmussen's redacted statements, arguing disclosure was required because he had raised the guilty-except-insane defense under A.R.S. §§ 13-502, -3993(D) (2010), -4508(B) (2010), and Arizona Rule of Criminal Procedure ("Rule") 11.7(a). Relying on *Austin v. Alfred*, 163 Ariz. 397, 788 P.2d 130 (App. 1990), Rasmussen successfully argued he was only required to produce copies of the doctors' records with his statements redacted. This special action followed.

¶8 Although *Austin* has remained unchallenged, its premise was

based on the insanity affirmative defense, that is, not guilty by reason of insanity…which has been statutorily modified to "guilty except insane"…After *Austin* was decided, the legislature removed the first part of the two-part insanity defense announced in *M'Naghten's Case*…What remains is the second part of the *M'Naghten* test; namely, "moral capacity," which requires the defendant to demonstrate by clear and convincing evidence "that at the time of the commission of the criminal act [the defendant] was afflicted with a mental disease or defect of such severity that [the defendant] did not know the criminal act was wrong." *Id.* at 748…*see* A.R.S. § 13-502(A), (C).

¶11 Once the insanity defense is raised, A.R.S. § 13-3993 (2010) allows the defendant to be examined, and removes any physician-patient privilege as to any communication made "as it relates to the defendant's mental state at the time of the alleged crime." A.R.S. § 13-3993(A), (C). The statute also provides that: If any mental disability defense is raised, both the state and the defendant shall receive prior to the trial complete copies of any report by a medical doctor or licensed psychologist who examines the defendant to determine the defendant's mental state at the time of the alleged crime or the defendant's competency. A.R.S. § 13-3993(D).

¶13 Although Rule 11.7 protects a defendant's privilege against self-incrimination, the rule also recognizes that a defendant can consent to the use of those statements. Ariz. R. Crim. P. 11.7(b)(1) (stating that a defendant's statement cannot be admitted "at the trial of guilt or innocence. . . without his or her consent"); *Tallabas*, 155 Ariz. at 323, 746 P.2d at 493. For example, in *Tallabas*, after stating that "Rule 11.7(b)(1) codifies the holding that it is fundamentally unfair for a court-appointed psychiatrist after compulsory examination to transmit a defendant's incriminating statements to the jury," we held that if a defendant calls a doctor to prove insanity, the defendant consents to the "prob[ing] and test[ing of] the bases of the doctor's opinion of insanity and expos[ing] any statements by defendant to the doctor insofar as they underlay or relate[] to that opinion"….

¶18 …For these reasons, we depart from *Austin* in concluding that a defendant who is examined by a non-court-appointed expert cannot, after giving notice of the guilty-except-insane defense, as a matter of law, redact his statements from his expert's report under Rule 11.4(b).

¶19 We now turn to this matter. A defendant who undergoes a court-ordered mental-health examination has a Fifth Amendment privilege against self-incrimination, and any statement to the examiner about the facts in the case shall be redacted. *See* A.R.S. § 13-4508(A), (C) (2010); Ariz. R. Crim. P. 11.4(a). If, however, a defendant gives notice under Rule 15.2(b) that he will raise the guilty-except-insane defense, the defendant must provide the complete and unredacted report from any non-court-appointed expert. *See* Ariz. R. Crim. P. 11.4(b).

¶20 Accordingly, Rasmussen will have to provide an unredacted copy of the court-appointed expert's report under Rule 15.2(c). Following our guidance in *Tallabas*, a court "will imply consent" to any evidence relating to the expert's report, "including disclosure of defendant's statements at the time of examination, to the extent that such statements relate to the issue of [guilty except insane]," 155 Ariz. at 325, 746 P.2d at 495, and which also includes the defendant's statements that he or she did not know the criminal act was wrong under § 13-502. *See also* A.R.S. § 13- 4508(B) ("Any evidence or statement that is obtained during an examination is not admissible . . . unless the defendant presents evidence that is intended to rebut the presumption of sanity."). Moreover, the disclosure is a matter of fundamental fairness, so that the State can be prepared to address the affirmative defense at trial. *See Wardius v. Oregon*, 412 U.S. 470, 475 (1973) (noting that "discovery must be a two-way street").

¶21 Finally, although the unredacted mental-health reports with Rasmussen's statements can be disclosed, the State cannot use them at trial to prove any element of its case beyond a reasonable doubt. *See Fletcher*, 149 Ariz. at 192, 717 P.2d at 871. In accordance with *Tallabas*, at trial the State may only use the defendant's statements at the time of the examination to the extent such statements relate to whether the defendant was guilty except insane or underlie the examiner's opinion on that issue. 155 Ariz. at 325, 746 P.2d at 495. Evidence of a defendant's inculpatory statements may not be admitted at trial to prove guilt. *Id*. at 326, 746 P.2d at 496 (citation omitted). Consequently, because Rasmussen has given notice that he is raising the affirmative defense of guilty except insane, we grant relief, reverse the ruling denying the State's motion to compel, and direct the superior court to order Rasmussen to provide a complete and unredacted copy of his expert's report to the State, as well as a complete and unredacted report from the court-appointed expert to allow the State to prepare to meet the affirmative defense.

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/SA%2016-0075.pdf

***State v. Koepke*, 2 CA-CR 2015-0308 (June 29, 2016)**: Ms. Koepke argued her attorney's assistance by a law student under Rule 38(d), Ariz. R. Sup. Ct., without her written consent, amounted to a denial of her right to counsel. Division 2 affirmed Koepke's conviction.

¶4 The record reveals, and Koepke does not dispute, that a licensed attorney represented her and was present in all proceedings. However, the record contains no written consent to a law student's appearance on Koepke's behalf, nor any indication that such written consent (if it existed) was ever "brought to the attention of the judge," a twofold violation of Rule 38(d)(5)(C)(i). Koepke argues that counsel's failure to strictly comply with Rule 38(d) meant that she lacked "licensed counsel" at the hearing on her motions in limine and at trial in violation of her right to counsel.

¶6 …A complete denial of the right to counsel is structural error requiring reversal.[1] *State v. Valverde*, 220 Ariz. 582, ¶ 10 & n.2, 208 P.3d 233, 235-36 & n.2 (2009); *State v. Moody*, 192 Ariz. 505, ¶23, 968 P.2d 578, 582 (1998); *see also United States v. Cronic*, 466 U.S. 648, 658-59 (1984) (complete denial of counsel, or counsel's utter failure to subject state's case to meaningful adversarial testing, renders adversary process presumptively unreliable).

> Note 1: It is not entirely clear from Koepke's briefs whether her argument is one of complete denial of counsel, a structural error, *see State v. Valverde*, 220 Ariz. 582, ¶ 10 & n.2, 208 P.3d 233, 235-36 & n.2 (2009), or rather an argument that counsel's failure to strictly comply with Rule 38(d) constitutes fundamental, prejudicial error, *see State v. Henderson*, 210 Ariz. 561, ¶¶19-20, 115 P.3d 601, 607-08 (2005) (fundamental error review applies when defendant fails to object to alleged trial error). Although failure to obtain a defendant's consent to representation by a law student in violation of Rule 38(d) could constitute fundamental error, Koepke has not met her burden of showing prejudice in this case. Thus, we proceed with our analysis under a structural error framework.

¶8 …the critical issue for purposes of a structural error analysis—was the defendant completely denied counsel at any critical stage of the proceeding? *See Valverde*, 220 Ariz. 582, ¶ 10 & n.2, 208 P.3d at 235-36 & n.2; *cf. City of Seattle v. Ratliff*, 667 P.2d 630, 631, 634-35 (Wash. 1983) (representation solely by non-attorney legal intern denied defendant right to counsel; intern was apparently prevented from contacting supervising attorney, who was not present during trial).

¶10 The record leaves no doubt that Koepke was represented by a licensed attorney at all critical stages. Her attorney was personally present at all proceedings in which the law student participated, and the attorney retained full responsibility for the representation. *See* Ariz. R. Sup. Ct. 38(d)(5)(C)(i)(c), (E)(iii). Koepke's argument that she was completely denied her right to counsel therefore fails.[2] *Terrazas*, 237 Ariz. 170, ¶5, 347 P.3d at 1152.

> Note 2: Although the record does not support Koepke's contention that structural error occurred in this case, we do not minimize the seriousness of counsel's failure to secure a defendant's written consent to representation by a Rule 38(d) student. The mandatory consent requirement of Rule 38(d)(5)(C)(i) operates in the shadow of a defendant's Sixth Amendment rights—it is not a "'mere suggestion[].'" *Denzel W.*, 930 N.E.2d at 980, *quoting People v. Houston*, 874 N.E.2d 23, 27 (Ill. 2007); *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Link to Opinion: https://www.appeals2.az.gov/Decisions/CR20150308opinion.pdf

***State of Arizona v. Monica Lara*, 1 CA-CR 2015-0506 (July 5, 2016):**

Holding: At trial for shoplifting with 2+ predicate offenses within the past 5 years, a class 4 felony, Ms. Lara's prior shoplifting convictions were elements of the charged offense, not sentencing enhancements. Therefore, the superior court properly declined to bifurcate the trial.

¶6 Lara contends her prior shoplifting convictions are sentencing enhancements, not elements of the charged offense. As such, she argues, the court should have ordered bifurcation because she was entitled to have the jury first determine whether she was guilty of shoplifting before the State introduced evidence of her prior convictions.

¶8 "Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). The indictment at issue here alleged that Lara committed the offense of shoplifting with two or more prior convictions — a class 4 felony in violation of A.R.S. § 13-1805(I). As relevant, A.R.S. § 13-1805(I) provides:

> A person who . . . commits shoplifting and who has previously committed or been convicted within the past five years of two or more offenses involving burglary, shoplifting, robbery, organized retail theft or theft is guilty of a class 4 felony.

¶9 This statutory language establishes the State's obligation to prove that Lara had "previously committed or been convicted within the past five years of two or more" shoplifting offenses in order to convict her of the charged offense. The prior convictions did not simply enhance the range of Lara's potential sentence; they elevated her offense to a class 4 felony….

¶10 Our conclusion is consistent with, though not dependent on, other statutory schemes. In the context of aggravated domestic violence and aggravated DUI, for example, we have held that the applicable statutes set forth elements by requiring the State to prove that the defendant previously committed similar offenses. *See, e.g.*, *State v. Newnom*, 208 Ariz. 507, 508, ¶ 5 (App. 2004) ("[T]he existence of two or more prior convictions for domestic violence is an element of the offense of aggravated domestic violence."); *State v. Superior Court (Walker)*, 176 Ariz. 614, 616 (App. 1993) (aggravated DUI based on prior violations "establishes an element of the substantive offense . . . and the state cannot convict defendant unless it proves that fact").

¶11 *State v. Burns*, 237 Ariz. 1 (2015), is distinguishable. In *Burns*, the Arizona Supreme Court held that a weapons misconduct charge should be severed from other counts because trial for that offense included evidence of a prior conviction, which was unfairly prejudicial as it related to other charges. But *Burns* does not address bifurcation of a charge for which a prior conviction is an element of the offense, and under *Geschwind*, bifurcation is not required:

> Our characterization of the prior conviction [for DWI] as an element of the crime [of felony DWI] rather than a mere sentencing consideration settles the question of appellant's entitlement to a bifurcated trial. The procedure used in the trial court, as to proof of the prior DWI conviction, was proper under 17 A.R.S. Rules of Criminal Procedure, rule 19, because proof of the prior conviction was part of the state's burden of proving all the elements of the crime charged. 136 Ariz. at 362.

¶12 *Geschwind*'s statement that characterizing a prior conviction as an element of the crime settles the bifurcation question is arguably inconsistent with subsequent capital case jurisprudence, in which aggravating circumstances in first-degree murder cases are treated as the "functional equivalent of an element of a [first-degree murder] offense" under *Ring v. Arizona*, 536 U.S. 584, 609 (2002), but are nonetheless submitted to the jury *after* a finding of guilt for first-degree murder. *See* A.R.S. § 13-752. Nevertheless, *Geschwind* remains the controlling law.

¶13 As Lara concedes, when prior convictions are elements of a charged offense, trial courts may not preclude them as evidence. *See State ex rel. Romley v. Superior Court (Begody)*, 171 Ariz. 468, 471 (App. 1992) ("[T]he trial court possessed no discretion to bifurcate defendants' trials to eliminate the 'prejudice' resulting from proof of an element of the offense charged."). Lara's prior shoplifting convictions were "an integral part of the crime with which [she] was charged." *Geschwind*, 136 Ariz. at 363…

Link to opinion: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CR15-0506.pdf

TRIAL RESULTS

Jury and Bench Trial Results

March 2016-May 2016

Indigent Representation

Public Defender's Office – Trial Division

Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
Group 1					
4/25/2016	De George Krulic	Rummage	CR2015-127113-001 Agg Aslt-Officer, F5 Resist Arrest-Physical Force, F6	 1 1	Jury Trial Guilty as Charged
5/2/2016	Geist Rankin Cravath	Cunanan	CR2015-130214-001 Poss Wpn By Prohib Person, F4	 2	Jury Trial Not Guilty
Group 2					
3/25/2016	Gurion McGivern Lynn Menendez	Brain	CR2014-132129-001 Sexual Conduct With Minor, F2 Sexual Abuse, F3	 3 1	Jury Trial Guilty Lesser/Fewer
4/19/2016	Gurion Munoz McGivern	Reinstein	CR2015-121220-001 Theft-Means Of Transportation, F3 Theft Credit Card-Control, F5 Fraudulent Use Of Credit Card, M1	 1 1 1	Jury Trial Guilty as Charged
5/13/2016	Ellexson Brazinskas McGivern	French	CR2015-001922-001 Dang Drug-Transp And/Or Sell, F2	 1	Jury Trial Guilty as Charged
Group 3					
3/03/2016	Williams Brady Schyvynck White Henry Martin	Astrowsky	CR2014-100341-001 Burglary 1st Degree, F2 Kidnap, F2 Aggravated Assault, F3 Armed Robbery, F2 Sexual Assault, F3 Sexual Assault, F2 Sexual Abuse, F5	 1 1 1 1 1 4 1	Jury Trial Not Guilty

Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
3/18/2016	Guerra Alkhatib	Padilla	CR2014-144736-001 Dangerous Drug-Poss/Use, F4 Drug Paraphernalia-Possess/Use, F6	1 1	Jury Trial Guilty as Charged
4/08/2016	Spears Tomaiko Costanzo	Newcomb	CR2013-004836-001 Criminal Damage-Deface, F5	1	Bench Trial Guilty Lesser/Fewer
4/14/2016	Brady Tomaiko Thredgold	Bernstein	CR2014-118441-001 Agg Aslt-Deadly Wpn/Dang Inst, F3 Agg Aslt-Health Care Profsnl, F6	2 1	Jury Trial Not Guilty
Group 4					
5/5/2016	Hintze Verdugo Kunz Becker	Richter	CR2015-141559-001 Resist Arrest-Physical Force, F6	1	Jury Trial Not Guilty
5/31/2016	Fune Verdugo Kunz Schreck	Fenzel	CR2015-107165-001 Possession of Dangerous Drugs	1	Jury Trial Guilty as Charged
Group 5					
3/17/2016	Champagne Jones	Adleman	CR2015-118478-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Bench Trial Guilty Lesser/Fewer
3/30/2016	Vandergaw Downs Leazotte McGivern	Rea	CR2015-101535-001 Agg Aslt-Deadly Wpn/Dang Inst, F2	2	Jury Trial Guilty Lesser/Fewer
4/8/2016	Beatty Menendez	Newcomb	CR2015-001281-001 Sexual Assault, F2 Kidnap-Death/Inj/Sex/Aid Fel, F2 Child/Vul Adult Abuse-Intent, F4	3 1 1	Bench Trial Guilty But Insane

Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
4/18/2016	Penunuri Champagne Thompson	Rummage	CR2015-134575-001 Burglary 2nd Degree, F3 Criminal Damage-Deface, F6 Crim Tresp 1st Deg-Res Struct, F6	 1 1 1	Bench Trial Guilty Lesser/Fewer
5/20/2016	Gottry Alexander Rondeau	Adleman	CR2015-030277-001 Marijuana-Possess/Use, F6	1	Bench Trial Guilty Lesser/Fewer
5/20/2016	Gottry Alexander	Adleman	CR2015-143238-001 Marijuana-Possess/Use, F6	1	Bench Trial Guilty Lesser/Fewer
5/27/2016	Whitney	Adleman	CR2014-102581-001 Marijuana Violation, F6	1	Bench Trial Guilty Lesser/Fewer
Group 6					
3/14/2016	Vandergaw Wolkowicz Virgillo	Sinclair	CR2015-000892-001 Sexual Conduct With Minor, F6	1	Jury Trial Guilty as Charged
4/1/2016	Wrobel	Kiley	CR2010-110385-001 Resisting Arrest, F6	1	Jury Trial Guilty as Charged
4/5/2016	Hermes Hallam	Otis	CR2015-121498-001 Burglary 2nd Degree, F3 Criminal Damage, F6 Threatening/Intimidating, F3 Threatening/Intimidating, F3 Assisting a Criminal Street Gang, F3	 1 1 1 1 1	Jury Trial Guilty Lesser/Fewer
4/28/2016	Vandergaw Virgillo	Passamonte	CR2015-001645-001 Agg Aslt-Deadly Wpn/Dang Inst, F3 Disord Conduct-Weapon/Instr, F6	 1 1	Jury Trial Guilty as Charged
5/25/2016	Wrobel Aceves Springer	Nothwehr	CR2015-002295-001 Marijuana-Possess/Use, F6 Drug Paraphernalia-Possess/Use, F6	 1 1	Jury Trial Guilty as Charged

Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
Capital Group					
4/7/2016	Henager Tomaiko White	Ireland	CR2014-155644-001 Child/Vul Adult Abuse-Intent, F3	1	Jury Trial Guilty Lesser/Fewer
Specialty Court Group					
3/11/2016	Knobbe Clesceri Costanzo	Adleman	CR2015-104420-001 Burglary 1st Degree, F2 Aggravated Assault, F6	1 1	Jury Trial Guilty as Charged
Vehicular Group					
4/22/2016	Baker McGrath Vondra Williamson	Kemp	CR2014-132330-001 Manslaughter-Reckless, F2	1	Jury Trial Guilty as Charged
5/9/2016	Baker Decker	Kiley	CR2012-156377-001 Armed Robbery, F2 Kidnap, F2 Aggravated Assault, F3	1 1 2	Jury Trial Guilty as Charged

Legal Advocate – Trial Results

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
Felony Trial					
3/11/2016	Woods Gracia	Passamonte	CR2015-117695-001 Aggravated Assault, F5 Resisting Arrest, F6	1 1	Bench Trial Guilty as Charged
4/14/2016	Mitchell	Bassett	MS2015-000009 Sexually Violent Person Civil Commitment Default Chg, Na	1	Jury Trial Guilty as Charged
4/21/2016	Rose Rood	Granville	CR2013-002730 Murder 1st Degree, F1 Misconduct Involving Weapons, F4 Dschg Firearm At A Structure, F3 Armed Robbery, F2	1 1 1 2	Jury Trial Guilty Lesser/Fewer

Legal Advocate – Trial Results

Date Closed	Team	Judge	Case No. and Type	Result
Dependency				
03/15/2016	Miller	Smith	JD507219 Severance Trial	Severance Granted
3/23/2016	Konkol	Flores	JD27245 Severance Trial	Severance Granted
3/29/2016	Konkol	Flores	JD31932 Dependency Trial	Dependency Found
5/2/2016	Konkol	Flores	JD28594 Dependency Trial	Dependency Found

Legal Defender – Trial Results

Date Closed	Team	Judge	Case No. and Charge(s)	Counts	Result
Capital					
5/27/2016	Bogart Carter	Gates	CR2013-004868-001 Murder 1st Degree, F1 Armed Robbery, F3	1 1	Jury Trial Guilty as Charged
Felony					
3/15/2016	Campbell	Sanders	CR2015-145355-001 Poss Wpn By Prohib Person, F4	1	Jury Trial Not Guilty
4/13/2016	Campbell Santiago	Richter	CR2015-110536-001 Agg Aslt-Officer, F6	1	Bench Trial Guilty Lesser/Fewer
4/22/2016	Kinkead Collins McReynolds Handgis Prusak Whitt	Roberts	CR2014-100020-001 Murder 1st Degree, F1	1	Bench Trial Guilty But Insane
4/29/2016	Valentine	Gates	CR2013-426135-001 Murder 1st Degree, F1	1	Jury Trial Guilty Lesser/Fewer
5/10/2016	Shipman	Kemp	CR2014-161290-001 Poss Wpn By Prohib Person, F4	2	Jury Trial Guilty as Charged

*for*The Defense

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